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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 361. 107

CAROLINE M. FORSYTH, IMPLEADED WITH JACOB FORSYTH, PLAINTIFF IN ERROR,

vs.

JAMES R. DOOLITTLE, JAMES R. DOOLITTLE, JUNIOR, AND HENRY McKEY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 8, 1883.

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INDEX.

	Original.	Print.
Caption	1	1
Præcipe for summons	2	1
Bond for costs	2	1
Summons	3	2
Marshal's return	4	2
Order extending time to plead	6	3
Plea	7	3
Order allowing amendment of declaration, &c.	8	4
Amended declaration	9	4
Bill of particulars	33	15
Hearing and continuance	38	18
"	39	18
"	40	18
"	41	19
"	42	19
"	43	20
"	44	20
"	45	20
"	46	21
"	47	21

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	Original.	Print.
Hearing and continuance	48	22
"	49	22
"	50	23
Submission to jury, &c.	51	23
Verdict	52	24
Judgment	53	24
Bill of exceptions	54	25
Evidence for plaintiffs	54	25
Testimony of J. R. Doolittle, Jr.	55	25
A. J. Averill	57	26
Joseph B. Chandler	58	27
Isaac N. Hardin	58	27
Joseph P. Ord	59	27
John W. Simpson	63	30
Wm. C. Gulliver	68	33
Leonard Swett	74	36
Hypothetical statement No. 1	75	36
Exhibit 5—Contract between Jacob Forsyth *et ux.* and Joseph P. Ord, ——— —, 1881	77	39
10—Contract between Jacob Forsyth *et ux.* and Joseph P. Ord, June 10, 1881	84	44
35—Contract between Jacob Forsyth *et ux.* and Joseph P. Ord, July —, 1881	94	53
37—Part of letter signed Alfred Bishop Mason, ——— —, ——	96	56
6—Proposed amendment to contract of June 10	98	57
7— " " "	98	57
14—Contract between Caroline M. Forsyth and husband and Jos. P. Ord, July —, 1881	99	58
11—Contract between Caroline M. Forsyth and husband and Jos. P. Ord, August 4, 1881	107	65
12—Memorandum modifying mode of payment prescribed in contracts of June 10 and August 4, 1881	112	70
13—Supplemental agreement between Caroline M. Forsyth and husband and Jos. P. Ord, November 7, 1881	118	75
45—Extract from letter of J. R. Doolittle, Jr., October 21, ———	120	77
Hypothetical statement No. 2	123	79
Exhibit 33—Contract of Jacob Forsyth *et ux.* with Dan'l H. Horne, June 10, 1881	124	80
39—Contract of Jacob Forsyth *et ux.* with Dan'l H. Horne, June 10, 1881	129	82
Hypothetical statement No. 3	132	84
Exhibit 22—Bill of foreclosure	135	86
24—Letter of Jacob Forsyth, June 1, 1881	140	89
25—Letter of J. R. Doolittle, Jr., to McDonald & Butler, June 3, 1881	141	89
26—Letter of McDonald & Butler to J. R. Doolittle, Jr., June 4, 1881	144	91

	Original.	Print.
Exhibit 23—Extract from amended bill	144	91
Answers of Jacob Forsyth *et ux.*	154	97
Plea of Harriet S. Clarke	170	106
27—Letter of Doolittle & McKey to McDonald & Butler, June 11, 1881	172	107
57—Letters of Doolittle & McKey to McDonald & Butler, July 27, ——, &c.	173	108
23—Answer of Studdy Leigh *et al.*	174	108
73—Letter of Doolittle & McKey to McDonald & Butler, October 7, 1881	183	114
74—Extract from letter of McDonald & Butler, October 8, 1881	185	115
48—Letter of plaintiffs to Mr. Seymour, October 31, 1881	186	116
42—Letter of plaintiff to Senator McDonald, ——— —, ——	188	117
49—Bill to redeem from mortgage	191	119
Stipulation	212	131
117—Letter of J. R. Doolittle, Jr., to Geo. C. Butler, November 12, 1881	213	132
49—Decree, March 31, 1882	214	132
Hypothetical statement No. 4	216	133
Exhibit 59—Letter of plaintiffs to McDonald & Butler, August 10, 1881	218	134
60—Letter of McDonald & Butler to plaintiffs, ——— —, ——	219	135
61—Letter of plaintiffs to Allman, August 12, ——	221	136
63— " " August 15, ——	222	136
62—Telegram of Allman to plaintiffs, August 15, ——	223	237
64—Letter of plaintiffs to McDonald & Butler, August 18, 1881	224	138
65—Letter of McDonald & Butler to J. R. Doolittle, Jr., August 19, 1881	228	140
66—Letter of J. R. Doolittle, Jr., to McDonald & Butler, August 20, 1881	229	141
68—Letter of McDonald & Butler to plaintiffs, August 20, 1881	231	142
67—Letter of McDonald & Butler to plaintiffs, August 23, 1881	232	142
69—Letter of plaintiffs to McDonald & Butler, August 24, 1881	233	143
54—Bill in case of Tremearne *et al. vs.* Forsyth *et al.*	234	144
70—Letter of plaintiffs to McDonald & Butler, August 31, 1881	247	151
72—Letter of plaintiffs to Francis DePfuhl, October 7, 1881	250	153
73—Letter of plaintiffs to McDonald & Butler, October 7, 1881	251	153
74—Letter of McDonald & Butler to plaintiffs, October 8, 1881	252	154

	Original.	Print.
Exhibit 75—Letter of plaintiffs to Francis DePfuhl, October 11, 1881	252	154
76—Letter of Francis DePfuhl to plaintiffs, October 12, 1881	253	154
77—Stipulation as to points to be argued in Tremearne *et al. vs.* Forsyth *et al.*	254	155
78—Letter of plaintiffs to McDonald & Butler, October 14, 1881	256	156
79—Letter of McDonald & Butler to plaintiffs, October 15, 1881	257	157
80—Letter of plaintiffs to Francis DePfuhl, October 17, 1881	257	157
81—Letter of plaintiffs to Francis DePfuhl, October 20, 1881	258	157
83—Letter of plaintiffs to Francis DePfuhl, October 24, 1881	259	158
84—Letter of Francis DePfuhl to plaintiffs, October 25, 1881	259	158
85—Telegram from McDonald & Butler to plaintiffs, October 25, ——	260	159
86—Letter of plaintiffs to McDonald & Butler, October 29, 1881	261	159
87—Telegram of J. E. McDonald to plaintiffs, October 31, 1881	262	160
88—Letter of plaintiffs to Francis DePfuhl, October 31, 1881	262	160
89—Letter of W. Q. Gresham to plaintiffs, November 4, 1881	264	161
90—Amendment to bill	265	162
Letter of Jacob Forsyth to Edward Payne, October 28, 1880	278	169
Brief on demurrer for complainants	280	170
92—Letter of McDonald & Butler to plaintiffs, November 15, 1881	289	176
54—Decree, November 28, 1881	291	177
Hypothetical statement No. 5	292	177
Exhibit 109—Letter of Alfred B. Mason to plaintiffs, October 21, 1881	293	178
45—Letter of plaintiffs to Alfred B. Mason, ——, ——	293	178
110—Letter of Alfred B. Mason to plaintiffs, October 22, 1881	294	179
115—Mortgage from Green to Forsyth, November 10, 1881	295	179
Testimony of Robert Hervey	307	186
Erastus S. Williams	309	187
James Goggin	310	188
Wm. C. Grant	312	189
Thomas Hoyne	313	190
Henry S. Monroe	314	190
Evidence for defendants	315	190

	Original.	Print.
Exhibit A—Contract between Forsyth and Weston, May 11, 1881	315	190
Testimony of Daniel H. Horne	319	192
Charge to jury	320	192
Exceptions to charge	350	209
Defendants' request as to charge	356	213
Verdict	357	213
Motion for new trial	358	213
Order on motion for new trial	361	215
Certificate to bill of exceptions	362	215
Order as to bond	363	216
Bond on appeal	364	216
Supersedeas bond	366	217
Order that bond operate as supersedeas	368	218
Stipulation as to record	369	218
Clerk's certificate	370	218
Proof of service of writ of error	371	219
Writ of error	372	219
Proof of service of citation	373	220
Citation	374	221
Assignment of errors	375	221

1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms, in the city of Chicago, in the district aforesaid, before Hon. Thomas Drummond, circuit judge of the United States for the seventh circuit, and Hon. Henry W. Blodgett, district judge of the United States for the northern district of Illinois, on Monday, the twenty-fifth day of June, in the adjourned May term of said court, in the year of our Lord one thousand eight hundred and eighty-three, and of our Independence the one hundred and seventh year.

WM. H. BRADLEY, *Clerk.*

Assumpsit.

JAMES R. DOOLITTE, JAMES R. DOOLITTLE, Jr., and HENRY MCKEY
vs.
CAROLINE M. FORSYTH, Impleaded with Jacob Forsyth.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the sixth day of March, A. D. 1882, came the plaintiffs, by their attorneys, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in said district, their *præcipe* for a writ of summons and bond for costs in said entitled cause; which said *præcipe* and bond are respectively in the words and figures following, to wit:

2 *Præcipe.*

CHICAGO, *March* 6, 1882.

To Wm. H. Bradley, Esq., clerk of the circuit court of the United States for the northern district of Illinois.

SIR: Please issue a summons, returnable at the next May term of this court, in an action of trespass on the case upon promises, wherein James R. Doolittle, James R. Doolittle, Jr., and Henry McKey are plaintiffs and Caroline M. Forsyth & Jacob Forsyth are defendants, to their damage sixty thousand dollars.

DOOLITTLE & McKEY,
Attorneys pro se.

Endorsed: Filed Mar. 6, 1882. Wm. H. Bradley, clerk.

Bond for Costs.

UNITED STATES OF AMERICA, }
Northern District of Illinois, } *ss:*

Circuit Court to the May Term, A. D. 1882.

JAMES R. DOOLITTLE, JAMES R. DOOLITTLE, Jr., & HENRY MCKEY.
vs.
CAROLINE M. FORSYTH & JACOB FORSYTH.

In Assumpsit.

3 We enter — security for costs in this cause, and promise to

pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court, and in default of payment by the — of any costs ordered or adjudged to be paid by them, we hereby agree and stipulate that execution may issue against our property for any costs taxed against them.

Dated this 6th day of March, A. D. 1882.

DOOLITTLE & McKEY.

Endorsed: Filed M'ch 6th, A. D. 1882. W. H. Bradley, clerk.

On the same day, to wit, on the sixth day of March, A. D. 1882, there issued out of said clerk's office a writ of summons in said entitled cause, which said writ, together with the return of the marshal thereto attached, are in the words and figures following, to wit:

Summons.

Circuit Court of the United States of America.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

The United States of America to the marshal of the northern district of Illinois, Greeting:

We command you to summon Caroline M. Forsyth and Jacob Forsyth, if found in your district, to be and appear before our
4 judges of our circuit court of the United States for the northern district of Illinois, on the first day of the next term thereof, to be holden at Chicago, in the district aforesaid, on the first Monday of May next, to answer unto James R. Doolittle, James R. Doolittle, Jr., and Henry McKey, of a plea of trespass on the case upon promises to their damage, as it is alleged, of sixty thousand dollars; and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 6th day of March, in the year of our Lord one thousand eight hundred and eighty-two, and of our Independence the 106th year.

[SEAL.] W. H. BRADLEY, *Clerk.*

Special Deputy's Return.

UNITED STATES OF AMERICA, *Northern District of Illinois,* } *ss:*

Know all men by these presents that I have appointed, and by these presents do appoint, Joseph Spahn my true and lawful deputy to execute the annexed writ, J. R. Doolittle *et al. vs.* C. M. Forsyth *et al.*, and to make return of the execution thereof according to law.

A. M. JONES, [SEAL.]
U. S. Marshal for the Northern District of Illinois.

I have served the annexed writ in the following manner, to wit: By reading the same to and in the presence and the hearing
5 of Caroline M. Forsyth, therein named, on the 28th day of March, A. D. 1882.

A. M. JONES,
United States Marshal,
By JOS. M. SPAHN,
Special Deputy.

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

Joseph M. Spahn, being duly sworn, deposes and says that he served the annexed writ as stated in the foregoing return, and that the expense returned by him, in addition to the fees, was actually incurred, and that the same is according to law.

JOS. M. SPAHN.

Subscribed and sworn to before me this 28 day of March, A. D. 1882.

SAMUEL C. HAYES,
Notary Public.

Endorsed: Filed Apr. 1, A. D. 1882. W. H. Bradley, clerk.

6 Afterwards, to wit, on the twenty-eighth day of April, in the adjourned March term of said court, A. D. 1882, in the record of the proceedings thereof in said entitled cause before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

JAMES R. DOOLITTLE *et al. vs.* CAROLINE M. FORSYTH *et al.*

Assumpsit.

On motion of the defendant, Caroline M. Forsyth, by W. H. King, Esq., her attorney, the time for said defendant to demur or plead to the declaration herein is extended to the first Monday of June next.

7 Afterwards, to wit, on the second day of June, A. D. 1882, came the defendant, by her attorneys, and filed in said clerk's office her plea in said entitled cause, which said plea is in the words and figures following, to wit:

Plea.

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois. }

In the Circuit Court of the United States in and for the Northern District of Illinois.

CAROLINE M. FORSYTH, impleaded with Jacob Forsyth,
ads.
JAMES R. DOOLITTLE, JAMES R. DOOLITTLE, Jr., and HENRY MCKEY.

And the said defendant, Caroline M. Forsyth, by William H. King and Frederick W. Packard, her attorneys, comes and defends the wrong and injury when, &c., and says that she did not, together with said Jacob Forsyth, undertake or promise in manner and form as the said plaintiffs have above thereof complained against her and

the said Jacob Forsyth, and of this she puts herself upon the country, &c.

WILLIAM H. KING,
FREDERICK W. PACKARD,
Attorneys for the Defendant, Caroline M. Forsyth.

Endorsed: Filed June 2, 1882. W. H. Bradley, cl'k.

8 Afterwards, to wit, on the fourth day of April, in the adjourned March term of said court, A. D. 1883, in the record of the proceedings thereof in said entitled cause before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

JAMES R. DOOLITTLE *et al. vs.* CAROLINE M. FORSYTH *et al.*

Assumpsit.

Now come the parties, by their respective attorneys, and on motion of the plaintiffs, by their attorneys, leave is given them to amend their declaration, and it is ordered that the declaration as amended be engrossed, and, upon issue joined herein, thereupon come a jury of good and lawful men, to wit, Joseph Hooper, L. M. Hollister, John A. Thatcher, W. C. Pelgrim, Frank G. Daggett, Gilbert Barber, Robert B. Riddle, W. H. Hurt, R. S. Slocum, James W. Brown, Henry L. Bush, and A. S. Landon, who were all duly elected, tried, and sworn, well and truly, to try said issue, and, after hearing a part of the evidence, the hour of adjournment having arrived, it is ordered that the further trial of the cause be postponed until tomorrow morning.

On the same day, to wit, on the fourth day of April, A. D. 1883, came the plaintiffs, and filed in said clerk's office their amended declaration in said entitled cause, which said amended declaration is in the words and figures following, to wit:

9 *Amended Declaration.*

UNITED STATES OF AMERICA, *Northern District of Illinois,* } *ss:*

In the Circuit Court of the United States in and for the Northern District of Illinois.

James R. Doolittle, a citizen and resident of the State of Wisconsin; James R. Doolittle, Jr., a citizen of the State of Illinois and a resident of said district, and Henry McKey, a citizen of the State of Illinois and a resident of said district, plaintiffs in this suit, complain of Caroline M. Forsyth and Jacob Forsyth, her husband, both residents of Lake county, in the State of Indiana, and both citizens of said State of Indiana, defendants in this suit, summoned, etc., of a plea of trespass on the case upon promises:

For that whereas the said plaintiffs are, and for more than two years last past have been, attorneys, solicitors, and counsellors-at-

law, practicing as such in the courts of record in the State of Illinos and adjoining States, and in this court and other courts of the United States, as copartners under the firm name of Doolittle and McKey, having their office in the city of Chicago, in said district.

And whereas also the said defendants, on the first day of April, A. D. 1881, and for many years before that time, were pos-
10 sessed of large tracts of land situate in the said county of Lake, in the State of Indiana, to wit: About eight thousand acres, bounded in part by Lake Michigan, the Calumet river, Wolf lake and outlet, more particularly described in a certain mortgage or deed of trust executed by the said defendants to John A. Tierson, trustee, on or about the 30th day of December, A. D. 1875, and filed for record on or about the thirty-first day of December, A. D. 1875, in the office of the recorder of said county of Lake, in the State of Indiana, to secure the payment of twenty-eight promissory notes, dated October 1st, 1875, and payable in five years from said date without interest, at the office of The Continental Life Insurance Company in Hartford, Connecticut, aggregating the sum of one hundred and sixty-three thousand dollars, the said lands being then and there held by the said Caroline M. Forsyth, in her own right, and by the said Jacob Forsyth, in his right as her husband under the laws of the State of Indiana, to wit, on the first day of April, A. D. 1881, at the district aforesaid.

And whereas the said lands then and there, and for a long time previous thereto, had been and were of so little productive value that said defendants were wholly unable to pay the principal or the interest upon the said notes above mentioned when the same
11 became due, or any part thereof, and one Aquila Adams, with others claiming to be the assignees and legal holders thereof, had, to wit, on the first day of December, A. D. 1880, filed a bill to foreclose the said trust deed in the circuit court in and for the county of Lake, in the State of Indiana, and which suit was removed, upon the petition of said defendants, into the circuit court of the United States for the district of Indiana, and was then and there pending at the time of the retainer and employment of the plaintiffs, as hereinafter mentioned, to wit, on the first day of April, A D. 1881, at the district aforesaid.

And whereas also the said lands then and there and at the time of the said retainer and employment, hereinafter mentioned, had been and were encumbered and clouded by certain assessments for taxes and tax liens, ditch assessments, and other liens and clouds, and more particularly by certain claims set up thereon by John Tetherick, Charles Edward Tremearne, John Studdy Leigh, and Edward Payne, and others, growing out of steps taken, and certain contracts, powers of attorney, letters of instruction, letters, papers, and negotiations claimed by said parties to have been made, had, and given by said defendants, to wit, on the 31st day of December, A. D. 1880, to wit, before the first day of April at the district aforesaid.

12 And whereas also for a long space of time before the retainer and employment of the plaintiffs as hereinafter men-

tioned, the said defendants, from time to time, had made attempts to sell and convey said lands, but without success, and the same were then and there so heavily encumbered by said trust deed to said Pierson, and by the interest growing due thereon, as well as by the taxes and tax liens and other liens and clouds thereon, that it became, and was then and there, impossible for the defendants by any subsequent trust deed or mortgage to raise any further sum of money thereon, or to borrow upon said lands a sum of money sufficient to pay the indebtedness secured by said Pierson trust deed, and it then and there became and was a matter of the greatest importance and necessity to said defendant- that they should make a sale of said lands, and prevent a sale thereof under the said Pierson trust deed, as well as to take care of and put aside all other clouds, claims, incumbrances, and liens thereon; the said defendants, to wit, at Chicago, in the district aforesaid, on or about the first day of April, A. D. 1881, retained and employed the said plaintiffs as attorneys, solicitors, and counsellors, as aforesaid, and also as negotiators in and about the said trust deed upon said lands, and, amongst other things, in and about all other liens, incum-
13 brances, and clouds upon the title to said lands above referred to, and in and about the negotiation of the sale of said lands; in and about negotiating an option for the sale of said lands to one Milton Weston; in and about negotiating an option for the sale of saids lands to one Joseph P. Ord, his assignees and associates, for the consideration of about one million dollars; in and about the management and conduct of the necessary steps to the completion of the sale of said lands, and in and about divers suits, claims, and demands for or against said defendants in and about and concerning the said lands, and otherwise; and also in and about certain other lands and the titles thereto, in which the said defendants then and there were, or were then and there to become interested; and in and about drawing and preparing contracts for the purchase and sale of lands; and in and about various suits against the said defendants, of and concerning said lands first above mentioned, in the courts of the State of Indiana, and in the United States circuit court for the district of Indiana; and in and about the preparation of the deed of conveyance of said lands, and the mortgage to secure a part of the purchase-money thereof; in and about sundry contracts of purchase of other lands, in part to fulfil the contract made with the
14 said Joseph P. Ord, above mentioned, and for other purposes.

And generally, in and about clearing the title to said lands in such a manner as that any cloud, lien, defect, or incumbrance thereon should in no wise hinder or prevent the acceptance of said titles by the purchaser of said lands under said contract, and the consummation of said sale for the said consideration of one million dollars.

And whereas the plaintiffs being so retained and employed by the said defendants, in consideration thereof, then and there undertook and promised the said defendants that they, as such attorneys, solicitors, and counsel, and as negotiators, would in all things, to the best of their knowledge, skill, prudence, and diligence, faithfully do and

perform on their part all their duties in relation to all the matters above mentioned, and then and there, from and after the said first day of April, A. D. 1881, until, to wit, the first day of January, A. D. 1882, the said plaintiffs did in all things faithfully and diligently do and perform all things on their part which they were bound to do; that such labors covered a space of seven months and upwards, and were performed at Chicago, Crown Point, Indianapolis, and in the city of New York, and in the States of Massachusetts and Connecticut, to wit, at the district aforesaid; and whereas it was

15 then and there well known to the plaintiffs and defendants that it was doubtful whether such contemplated sale of said lands could or would be effected, and if the attempt to sell the same should fail the financial condition of said defendants would be greatly embarrassed and extremely critical, and that in such case the defendants would be unable to pay the plaintiffs for such services; and it was also then and there well known to the plaintiffs and the defendants that, in case said sale should be effected for the consideration above mentioned, or for a smaller consideration, the defendants would be able to pay the plaintiffs a large compensation for such services; and it was then and there, in consideration thereof, understood and agreed, by and between the said plaintiffs and the said defendants, to wit, on the first day of April, A. D. 1881, at Chicago, to wit, at the district aforesaid, that the compensation of the said plaintiffs, in case said sale should be consummated, should be large, liberal, and generous, and that the contingency of failure or success in the completion of said sale was then and there understood and agreed between the plaintiffs and defendants to enter into and form a material part of said contract of retainer and employment; and that by season of such contingency the compensation of said plaintiffs for such services in case of the successful completion of said sale should be large, liberal, and generous.

16 And the plaintiffs say that, in consideration of the premises, they did in all things do and perform all and everything necessary or proper for them to do and perform in their said employment aforesaid, and according to their said undertaking, and the said undertaking and agreement of the defendants, and on the faith thereof; and that they did materially aid in accomplishing, and did complete and accomplish, the sale of said lands for the sum of about one million dollars; that they did in all things, and with due dilligence and skill, and complete success, aid in completing and perfecting an option contract for the sale of said lands to Joseph P. Ord, and in procuring and obtaining for the said defendant, Caroline M. Forsyth, upon said contract of option, a large sum of money, to wit, ten thousand dollars; that afterwards, to wit, on or about the 4th day of August, A. D. 1881, at Chicago, aforesaid, they negotiated with the said Joseph P. Ord an extension of said option for sixty days, upon the payment to said Caroline M. Forsyth interest at the rate of six per centum per annum upon $999,000 during the continuance of said option, and afterwards, to wit, on the 24th day of September, A. D. 1881, at the city of New York, to wit, at the district aforesaid, the plaintiffs negotiated and perfected a certain other contract

between said defendants and said Ord, modifying the mode
17 of payment in said prior agreements specified, of great value to said defendants; among other things securing from said Ord a waiver of the right to demand back from the defendants the sum of ten thousand dollars paid by him conditionally as forfeit money to the defendants; and afterwards, to wit, on the 7th day of November, A. D. 1881, at Chicago, in the district aforesaid, the plaintiffs negotiated and perfected another contract with said Joseph P. Ord, still further modifying the mode of payment on said contemplated sale, and arranging the formalities of the completion thereof.

And the plaintiffs further say: That afterwards, to wit, on or about the 10th day of November, A. D. 1881, at Crown Point and at Indianapolis, to wit, at the district aforesaid, the said plaintiffs did materially aid in the final completion of said contract of sale by delivery of a deed of conveyance to the purchaser, and by the delivery of a mortgage to said Caroline M. Forsyth for a part of the purchase-money of said lands, and the payment of the remainder of said purchase-money in cash; and the plaintiffs did also, to wit, from the said first day of April, 1881, until, to wit, the first day of January, 1882, faithfully do and perform with care, diligence, and skill all the work and labor they were in duty bound to do by their said retainer and employment in and about all the said matters above mentioned, and did in all respects, and with perfect success, put
18 aside and clear the said titles to said lands from all clouds, liens, and encumbrances, so far as fully to satisfy the said Joseph P. Ord and his assignees, and their attorneys and counsel, as to said titles, under the terms and to the extent required in and by the said contract of option with said Joseph P. Ord, and to complete and carry through the sale and conveyance of said lands, under said contract, on or about the 10th day of November, A. D. 1881, to wit, at the district aforesaid; and the plaintiffs did then and there, also, as such attorneys, solicitors, and counsel, faithfully, diligently, and successfully render their care, skill, and labor in and about the prosecution and defence of all suits at law and in equity brought for or against the said defendants, of and concerning the said lands, in the courts of the State of Indiana, and in the circuit court of the United States for the district of Indiana, and in other courts, to wit, at Chicago, at the district aforesaid; and also in like manner, the plaintiffs, as such attorneys, solicitors, and counsel, and negotiators, did, and performed with like care, diligence, and skill, all other the labor which they were in duty bound to do, by virtue of their said employment and retainer, in all and all manner the business, negotiations, and suits at law and equity of the said defendants, to wit, at Chicago aforesaid at the times aforesaid.

19 And also, amongst other things, the said defendants theretofore, to wit, on the 10th day of June, A. D. 1881, at Chicago aforesaid, entered into a certain agreement with one Daniel H. Horne, wherein and whereby the said defendants became bound to pay to him the sum of fifty thousand dollars, in case the sale of said lands

by the said defendants should be consummated in the manner provided in said contract, with said Joseph P. Ord, of even date therewith, the said plaintiffs, at the instance and request of said defendants, bargained and negotiated to and with said Horne, and by means thereof the said Horne afterwards, to wit, on the 3d day of August, A. D. 1881, at Chicago, to wit, at the district aforesaid, made and entered into another contract and agreement with said defendants, wherein and whereby the said Horne agreed to receive from said defendants the sum of ten thousand dollars, instead of fifty thousand dollars.

And the plaintiffs aver that for the work and labor, care, diligence, and attendance of the plaintiffs, by the plaintiffs done and performed and bestowed as the attorneys, solicitors, counselors, and negotiators of and for the said defendants, and upon their said retainer and employment, for fees, commissions, and a large, liberal, and generous compensation for said services done and performed by the plaintiffs to and for the said defendants, at their special
20 instance and request, under and by virtue of the said understanding and agreement above mentioned, the said defendants became and were justly and reasonably indebted to the plaintiff, in the sum of seventy-five thousand dollars, lawful money of the United States of America, of which the said defendants then and there, to wit, on the first day of January A. D. 1882, at Chicago, to wit, at the district aforesaid, had notice; and being so indebted, and in consideration thereof, afterwards, to wit, on the first day of January, A. D. 1882, at Chicago, to wit, at the district aforesaid, undertook and then and there faithfully promised the said plaintiffs to pay to the plaintiffs the said sum of seventy-five thousand dollars, when they, the said defendants, should be thereunto afterwards requested.

And whereas also the defendants, at the times hereinafter mentioned, being possessed of and interested in as aforesaid a certain other large tract of land comprising, to wit, eight thousand acres, situate in the county of Lake and State of Indiana, which said land was then and there heavily encumbered by mortgage or trust deed to the amount of $160,000 and upwards, and by tax sales thereof; and said defendants then and there having no considerable means aside from their said interest in said tract of lands, the said Jacob having but recently been discharged in bankruptcy, and the said Caroline having debts and demands outstanding against her
21 to the amount of five thousand dollars and upwards, the defendants on, to wit, the first day of April, A. D. 1881, at Chicago, to wit, at the district aforesaid, retained and employed the plaintiffs as attorneys, solicitors, and counselors, and as negotiators generally to look after, conduct, and supervise the business and property matters of the said defendants; and then and there it was expressly agreed and understood by and between the plaintiffs and the defendants that the defendants were unable to pay for the services of the plaintiffs rendered and to be rendered unless the defendants should thereafter be able to effect a sale or a contract of sale of said lands, and receive means thereby, and that if no sale or

contract of sale thereof should be made, the defendants could not pay any amount whatever to the plaintiffs for such services; and that if a contract of sale or option contract for the sale thereof should be made, and a small payment made thereon to the defendants, only a small amount should be paid to the plaintiffs for such services if such contract should not be consummated by the purchase and sale of said lands, and if such sale should be consummated the plaintiffs should receive, and the defendants would pay to the plaintiff-, a large, generous, and satisfactory compensation for all the services rendered or to be rendered by the plaintiffs to the defendants
22 in and about the business and property affairs of said defendants within a reasonable time after the completion of such sale.

And the plaintiffs aver that, relying upon the said agreement of the said defendants, in consideration and on the faith thereof, then and there they entered upon the labor of caring for, conducting, and directing the business affairs of the defendants committed to their charge, and at their special instance and request, at the time and place aforesaid, and from thence forward up to and until on or about, to wit, the first day of January, A. D. 1882, when these plaintiffs were formally discharged from their said service and employment of the said defendants, to wit, at the district aforesaid, the plaintiffs faithfully, diligently, and skillfully did and performed all things necessary and proper to be done in and about the business affairs of the defendants committed to their charge by said defendants, a short statement of which said services is hereinafter set forth, as follows:

Drawing and negotiating contracts with Joseph P. Ord for the sale of said lands and conducting the carrying out and consummation of said contracts as the agents, negotiators, and attorneys of said defendants.

Work and labor done and services rendered in securing the approval of the titles to said lands by the counsel of said Ord, and in removing objections to and defects in said titles.

23 Drawing contract with Daniel H. Horne for commission.

Defending a suit to foreclose a mortgage or trust deed on said lands to secure $163,000 and interest, brought by Aquila Adams *et al. v.* Forsyth *et al.*, and pending in the circuit court of the United States for the district of Indiana.

Defending *for* Harriet S. Clarke, a defendant in said suit of Adams *et al. v.* Forsyth *et al.*

Defending against the claim of John Petherick and John Studdy Leigh, set up in said suit of Adams *et al. v.* Forsyth *et al.*

Obtaining necessary information in Connecticut and Massachusetts and preparing a bill to redeem from the trust deed to John O. Pierson; filing of said bill in the U. S. circuit court for the district of Indiana and depositing, under stipulations, $210,000 in the registry of said court, and obtaining service of order to plead on defendants.

Defending the suit of Charles Edward Trenesarne *et al. v.* Forsyth *et al.*, involving the title to said lands.

Negotiating and drawing a new and substituted contract with

Daniel H. Horne and said defendants at a reduction in the amount of $40,000.

Settling and releasing of record the judgment in Edwards *et al. v.* Forsyth *et al.*

Settling the suit of Banks *v.* Forsyth.

Consultations and advice touching claim against Caroline M. Forsyth on guaranty of note of Jacob Forsyth for $1,200.

24 Consultations and advice touching claim against Caroline M. Forsyth on guaranty of note for about $5,000, made by Jacob Forsyth.

Consultations and advice touching claim of Joseph P. Ord against Daniel H. Horne, George H. Leonard, Caroline M. Forsyth, and Jacob Forsyth for $10,000.

Consultations and advice touching the suit of Kreuter *vs* Forsyth.

Drawing and negotiating the terms and provisions of a mortgage to secure to Caroline M. Forsyth the payment of $666,666.67.

Consultations, interviews, and advice, drawing contracts, correspondence, examining abstract of title, surveys, etc., concerning the purchase of a tract of land from James Tully.

Drawing contract of purchase between Henry B. Dolton and Caroline M. Forsyth and examination of abstract of title.

Interviews and negotiations concerning certain lands held by Messrs. E. A. and C. B. Shed.

Consultations and advice concerning the title of a tract of land comprising about 800 acres.

Interviews and conferences with A. Harshberger.

Consultations and advice in regard to threatened attack upon the discharge in bankruptcy granted to Jacob Forsyth, and services at Indianapolis in this behalf.

Interviews concerning purchase of land from George M. Roberts, examination of abstract of title, drawing forms of contracts, obtaining deed from Roberts to Landgrebe, and deed from Landgrebe to Caroline M. Forsyth.

25 Interviews and consultation about bringing suit against Geo. M. Roberts for breach of warranty of title.

Examination of abstract of the title to property owned by Heinrich Eggers, Jr., and preparing affidavits for Eggers to sign.

Interviews and advice concerning the option contract with John F. Schroeder, examining abstract of title, and drawing agreement releasing right of entry on lands.

Interviews and advice concerning the option contract with one Proeschold, and examination of abstract of title.

Interviews and advice concerning the option contract with George Rausch, and examination of abstract of title.

Interviews and advice concerning the option contract with Fred. Eggers, and purchase of lands thereunder and examination of abstract of title.

Interviews and advice concerning the Holland abstract of title and examination thereof.

Interviews and advice concerning the option contract with Ed-

ward T. Cushing, and the purchase of the lands mentioned therein and the examination of the abstract of the title thereto.

Interviews and advice concerning the option contract with one Kreutzburg, examination of the abstract of title, and advice as to enforcement of contract and tender.

Interviews and advice concerning the contract with Benj. F. Cummins, and the examination of the abstract of title to the lands therein mentioned.

26 Interviews and advice concerning adverse claims of heirs of Louis Thoms, and examination of the abstract of title to property involved.

Interviews and correspondence concerning Martin Nolan.

Drawing deed from Caroline M. & Jacob Forsyth to Geo. T. Cline and interviews thereon.

Interviews and advice in regard to option contracts with one Westerfeldt.

Interviews and advice in regard to option contract with one Dause.

Conferences with defendants and with Messrs. Mason Brothers, examination of papers, maps, etc., with a view of the sale to the East Chicago Improvement Company of several tracts of land.

Services rendered in obtaining a temporary loan of $13,600 for said defendants.

Consultations and services in examining and altering option contract between Jacob Forsyth and Milton Weston, and numerous journeys made by the plaintiffs in the service of said defendants.

And the plaintiffs aver that on or about the 10th day of June, A. D. 1881, at Chicago, to wit, at the district aforesaid, the said defendants made and executed an option contract for the sale of said lands to one Joseph P. Ord, thereby giving to said Ord and his assigns the right, within a limited period, to purchase the said lands first above mentioned for the sum of one million dollars, and

27 received upon said contract a payment of ten thousand dollars, and thereafter, to wit, on or about the 10th day of November, A. D. 1881, at the city of Chicago, to wit, at the district aforesaid, the said option contract was consummated and carried out by the delivery of a deed of conveyance of said lands, and other lands in said county of Lake aforesaid, from said defendants to one William W. Green, of New York, the remote assignee of said Joseph P. Ord, and by the payment of $323,333.33, in cash, to said defendant, Caroline M. Fosyth, and by the execution and delivery of a mortgage of said lands in said deed described from said William W. Green to Caroline M. Forsyth, to secure the sum of $666,666.67, and the interest thereon on the same, being for part of the purchase-money of said lands so conveyed; whereupon, and by virtue of the said contract and agreement of the said defendants, it became and was, then and there, the duty of the defendants to pay to the plaintiffs, and the plaintiffs, then and there, by virtue of the terms of said contract and agreement, had the right to demand and receive of the said defendants a large, generous, and satisfactory compensation for all of the said work done and service rendered, and to be rendered, by them to the

said defendants in and about all of the said matters and business which were committed to their charge under the terms of said agreement. And the plaintiffs aver that the fair, just, and reasonable sum to which the plaintiffs were so entitled for their
28 said labor and services, to have and receive from the defendant-, was the sum of seventy-five thousand dollars, of which the said defendants then and there, to wit, on the first day of January, A. D. 1882, at Chicago, to wit, at the district aforesaid, had notice, and the said defendants then and there, at the time and place last aforesaid, under and by virtue of the said contract and agreement, became and were liable to pay unto the plaintiffs the further sum of seventy-five thousand dollars, and being so liable and in consideration thereof the said defendants afterwards, to wit, on the first day of January, A. D. 1882, at Chicago, to wit, at the district aforesaid, undertook and promised the plaintiffs to pay to them, the said plaintiffs, the said sum of seventy-five thousand dollars when they should be thereunto afterwards requested.

And whereas also, on, to wit, the first day of January, A. D. 1882, at Chicago, to wit, at the district aforesaid, in consideration that the plaintiffs, as attorneys-at-law, had before that time done and bestowed certain other work and services, examinations of papers, and giving legal opinions and advice in and about the business of the defendants and for them in and about a certain matter of controversy between the said defendants and John Studdy Leigh, Edward Payne, and John Petherick, of and concerning certain negotiations,
29 powers of attorney, letters of instruction affecting or claimed to affect the title to about eight thousand acres of land belonging to said defendant, Caroline M. Forsyth, of great value, to wit, of the value of five hundred thousand dollars and upwards, the defendants promised the plaintiffs to pay them, on request, so much money as they therefor reasonably deserved to have, and the plaintiffs aver that they then and there reasonably deserved to have therefor the further sum of five hundred dollars, whereof the defendants then and there had notice; yet the defendants, though requested, have not paid to the plaintiffs the said sum of money or any part thereof, but refuse so to do.

And whereas also the said defendants afterwards, to wit, on the first day of January, A. D. 1882, were indebted to the plaintiffs in the further sum of seventy-five thousand dollars, lawful money, for the work and labor, care, diligence, and attendance of the plaintiffs by the said plaintiffs before that time done, performed, and bestowed as the attorneys, solicitors, counsel, and negotiators of and for the said defendants, and upon their retainer, in and about the prosecuting, defending, and soliciting of divers other causes, suits, and business for the said defendants, and for fees, charges, and compensation due and of right payable to the plaintiffs in respect thereof, and also for other the work and labor, care, diligence, and at-
30 tendance of the plaintiffs before that time done, performed, and bestowed in and about the drawing, copying, and engrossing of divers conveyances, deeds, writings, and contracts for the said defendants, and in and about other the business of the said

defendants, and also for other work and labor, care, skill, and diligence of the said plaintiffs before that time done, performed, and bestowed in and about negotiating and selling large tracts of land situate in the State of Indiana, for the sum of about one million dollars, for the said defendants, and for their reasonable fees and commissions upon such sale.

And also for other divers journeys and attendances by the plaintiffs before them made, performed, and given in and about the said business and other business of the said defendants, and at their special instance and request. And being so indebted they, the said defendants, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at Chicago aforesaid, undertook and promised the said plaintiffs to pay them so much money as they reasonably deserved to have of the said defendants when they, the said defendants, should be thereunto afterwards requested. And the said plaintiffs aver that they therefor reasonably deserved to have of the said defendants the further sum of seventy-five thousand dollars, to wit, at Chicago aforesaid, whereof the said defendants afterwards, to wit, on the day and year last aforesaid, had notice.

31 And whereas also the said defendants afterwards, to wit, on the first day of January, A. D. 1882, at Chicago aforesaid, were indebted to the said plaintiffs in the further sum of seventy-five thousand dollars, lawful money, for the work and labor, care, diligence, and skill of the said plaintiffs before that time done, performed, and bestowed in and about the business of the said defendants, and at their special instance and request; and in the like sum for money before that time lent and advanced by the said plaintiffs to the said defendants, at the special instance and request of the said defendants; and in the like sum for other money by the said plaintiffs before that time paid, laid out, and expended for the said defendants, and at the like special instance and request of the said defendants; and in the like sum for other money by the said defendants before that time had and received to and for the use of the said plaintiffs; and in the like sum for other money before that time and then due and owing to the said plaintiffs for interest upon and for the forbearance of divers other sums of money before that time and then due and owing from said defendants to said plaintiffs; and in the like sum for the price of work then done, and material for the same provided, by the said plaintiffs for the said defendants, and at the like special instance and request of the

32 said defendants. And being so indebted the said defendants, in consideration thereof, afterwards, to wit, on the day and year aforesaid, and at the place last aforesaid, undertook and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the several sums of money in this count mentioned, when the said defendants should be thereunto afterwards requested.

And whereas also the said defendants afterwards, to wit, on the day and year last aforesaid, and at the place last aforesaid, accounted, together with the said plaintiffs, of and concerning divers other sums of money before that time due and owing from the said de-

fendants to the said plaintiffs, and then and there being in arrear and unpaid, and upon such accounting the said defendants then and there were found to be in arrear and indebted to the said plaintiffs in the further sum of seventy-five thousand dollars of like lawful money aforesaid, and, being so found in arrear and indebted to the said plaintiffs, the said defendants, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, and at the place last aforesaid, undertook and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the sum of money last mentioned when the said defendants should be thereunto afterwards requested.

Nevertheless, the said defendants, although often requested, to wit, at the place last aforesaid, have not yet paid the said several
33 sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiffs, but to pay the same, or any part thereof, to the said plaintiffs the said defendants have hitherto wholly neglected and and refused, still do neglect and refuse, to the damage of the plaintiffs of seventy-five thousand dollars; and therefore they bring their suit, etc.

DOOLITTLE & McKEY,
Attorneys pro se.

Bill of Particulars.

To drawing and negotiating contracts with Joseph P. Ord for the sale of about thousand acres of land for one million dollars, and conducting the carrying out and consummation of said contracts as the agents, negotiators, and attorneys of the defendants	$40,000 00
To work, labor, and service rendered in securing the approval of the titles to said lands by the counsel of the purchaser, and in removing objections and defects in said titles	5,500 00
To defending for C. M. and Jacob Forsyth a suit to foreclose the Pierson trust deed, brought by Aquila Adams *et al. v.* Forsyth *et al.*, pending in the United States circuit court for the district of Indiana	5,500 00
To defending said suit on behalf of Harriet T.
34 Clarke, a defendant therein, at the request of defendants	250 00
To defending against the claim of John Petherick and John Suddy Leigh set up in said foreclosure suit of Adms *et al v.* Forsyth *et al.*	$250 00
To obtaining requisite information and preparing bill to redeem from the Pierson trust deed, filing said bill in the United States circuit court for the district of Indiana, depositing two hundred and ten thousand dollars in said court under stipulations, and obtaining service upon the defendants to said bill	$5,500 00
To defending the suit of Charles Edward Tremearne *et al. v.* Forsyth	$5,500 00

To negotiating and drawing a contract with Daniel H. Horne for commissions of $50,000 ..... $250 00

To negotiating and drawing a new and substituted contract with Daniel H. Horne at a reduction of $40,000 ..... $16,000 00

To services in settling and releasing of record judgment in Edwards *et al v.* Forsyth $100 00

To services in settling the suit of Banks *v.* Forsyth $25 00

To consultations and advice touching claim against Caroline M. Forsyth on guaranty of note of Jacob Forsyth for $1,200 and interest $50 00

To consultations and advice touching claim against Caroline M. Forsyth on guaranty of note for
35 $5,000 and over made by Jacob Forsyth $100 00

To consultations and advice touching the claim of Joseph P. Ord against D. H. Horne, George H. Leonard, Caroline M. and Jacob Forsyth for $10,000 ..... $200 00

To consultations and advice in the suit of Kreuter *v.* C. M. and Jacob Forsyth $25 00

To drawing and negotiating the terms and provisions of a mortgage to secure Caroline M. Forsyth the payment of the sum of $666,666.67 ..... $1,000 00

To consultations and advice, drawing contracts, correspondence, examining abstracts, surveys, etc., concerning the purchase of a tract of land from James Tully $300 00

To drawing contract of purchase between Henry B. Dolton and Caroline M. Forsyth, and examining abstract of title $25 00

To interviews, consultations, and negotiations concerning lands held by Messrs. E. A. and C. B. Shedd $100 00

To consultations and advice as to title of a tract of land comprising about 800 acres $25 00

To interviews and conferences with A. Harshberger $50 00

To consultations and advice in regard to the claim of one Leib, and threatened attack upon the discharge in bankruptcy granted to Jacob Forsyth, and to examination of proceedings and service at Indianapolis in this behalf $50 00

36 To interviews and advice concerning purchase of land from Geo. M. Roberts, examining abstract of title, drawing form of contracts, and acknowledgements by subscribing witness, obtaining deed from Roberts to Landgrebe, and from Landgrebe to Caroline M. Forsyth $100 00

To consultations with Jacob Forsyth, examination of survey, etc., in regard to bringing suit against George M. Roberts for breach of warranty of title $25 00

To examination of abstract of title to property owned by Heinrich Eggers, Jr., and preparing affidavit for him to make $25 00

To consultations and advice, drawing agreements and release, examining abstract of title in regard to land contract with John F. Schroeder $50 00

To consultations and advice concerning the option contract with one Proeschold and examination of abstract of title $25 00

To consultations and advice, drawing agreements, and examination of abstract of title concerning option contract with George Rausch $25 00

To consultations and drawing deed from Caroline M. Forsyth and Jacob Forsyth to George T. Cline $10 00

To consultations and advice concerning option contract with and purchase from Fred. Eggers and examining abstract of title to land $50 00

37 To consultation and advice concerning the Holland abstract and the examination thereof $25 00

To consultations and advice concerning option contract with Edward T. Cushing, examination of title and drawing assignment, and closing the sale $100 00

To interviews and advice concerning the option contract with one Kreutzburg, examination of abstract of title, and advice as to enforcement of contract and tender $40 00

To interviews and advice and correspondence concerning the contract with Benj. F. Cummins, correcting and altering the same, and examination of abstract of title to lands therein mentioned $300 00

To consultations and advice concerning adverse claim of heirs of Louis Thoms, and examination of abstract of title to the property involved $50 00

To interviews and correspondence concerning Martin Nolan $25 00

To interviews and advice in regard to option contract with one Westerfeldt $10 00

To interviews and advice in regard to option contract with one Dause $10 00

To conferences with defendants and with Messrs. Mason Brothers in order to secure the sale of several tracts of land to East Chicago Improvement Company of the value of $75,000 and upwards $250 00

To services in obtaining temporary loan of $13,600 for said defendants $150 00

38 To consultation and services in examining and altering option contract between Jacob Forsyth and Milton Weston $150 00

(Endorsed:) Filed April 4, 1883. Wm. H. Bradley, clerk.

Afterwards, to wit, on the fifth day of April, in the adjourned March term of said court, A. D. 1883, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

JAMES R. DOOLITTLE *et al. vs.* CAROLINE M. FORSYTH *et al.*

Assumpsit.

Now come again the parties by their attorneys, and now come also the jury, in this behalf empaneled and sworn, and after hearing additional evidence without concluding the same, the hour of adjournment having arrived, it is ordered that the further trial of the cause be postponed until to-morrow morning.

39 Afterwards, to wit, on the sixth day of April, in the adjourned March term of said court, A. D. 1883, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

JAMES R. DOOLITTLE *et al. vs.* CAROLINE M. FORSYTH *et al.*

Assumpsit

Now come again the parties by their attorneys, and now come also the jury in this behalf empaneled and sworn, and after hearing additional evidence, without concluding the same, the hour of adjournment having arrived, it is ordered that the further trial of the cause be posponed until to-morrow morning.

Afterwards, to wit, on the seventh day of April, in the adjourned March term of said court, A. D. 1883, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

JAMES R. DOOLITTLE *et al. vs.* CAROLINE M. FORSYTH *et al.*

Assumpsit.

40 Now come again the parties by their attorneys, and now come also the jury in this behalf empaneled and sworn, and after hearing additional evidence, without concluding the same, the hour of adjournment having arrived, it is ordered that the further trial of the cause be postponed until Monday morning next.

Afterwards, to wit, on the ninth day of April, in the adjourned March term of said court, A. D. 1883, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

JAMES R. DOOLITTLE *et al. vs.* CAROLINE M. FORSYTH *et al.*

Assumpsit.

Now come again the parties by their attorneys, and now come

also the jury in this behalf empaneled and sworn, and after hearing additional evidence, without concluding the same, the hour of adjournment having arrived, it is ordered that the further trial of the cause be postponed until to-morrow morning.

41 Afterwards, to wit, on the tenth day of April, in the adjourned March term of said court, A. D. 1883, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

JAMES R. DOOLITTLE *et al. vs.* CAROLINE M. FORSYTH *et al.*

Assumpsit.

Now come again the parties by their attorneys, and now come also the jury in this behalf empaneled and sworn, and after hearing additional evidence, without concluding the same, the hour of adjournment having arrived, it is ordered that the further trial of the cause be postponed until to-morrow morning.

Afterwards, to wit, on the eleventh day of April, in the adjourned March term of said court, A. D. 1883, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

JAMES R. DOOLITTLE *et al. vs.* CAROLINE M. FORSYTH *et al.*

Assumpsit.

42 Now come again the parties by their attorneys, and now come also the jury in this behalf empaneled and sworn, and after hearing additional evidence, without concluding the same, the hour of adjourment having arrived, it is ordered that the further trial of the cause be postponed until to-morrow morning.

Afterwards, to wit, on the twelfth day of April, in the adjourned March term of said court, A. D. 1883, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

JAMES R. DOOLITTLE *et al. vs.* CAROLINE M. FORSYTH *et al.*

Assumpsit.

Now come again the parties by their attorneys, and now come also the jury in this behalf empaneled and sworn, and after hearing additional evidence, without concluding the same, the hour of adjournment having arrived, it is ordered that the further trial of the cause be postponed until to-morrow morning.

43 Afterwards, to wit, on the thirteenth day of April, in the adjourned March term of said court, A. D. 1883, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

JAMES R. DOOLITTLE *et al. vs.* CAROLINE M. FORSYTH *et al.*

Assumpsit.

Now come again the parties by their attorneys, and now come also the jury in this behalf empaneled and sworn, and after hearing additional evidence, without concluding the same, the hour of adjournment having arrived, it is ordered that the further trial of the cause be postponed until to-morrow morning.

And afterwards, to wit, on the fourteenth day of April, in the adjourned March term of said court, A. D. 1883, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

JAMES R. DOOLITTLE *et al. vs.* CAROLINE M. FORSYTH *et al.*

Assumpsit.

44 Now come again the parties by their attorneys, and now come also the jury in this behalf empaneled and sworn, and after hearing additional evidence, without concluding the same, the hour of adjournment having arrived, it is ordered that the further trial of the cause be postponed until Monday morning next.

Afterwards, to wit, on the sixteenth day of April, in the adjourned March term of said court, A. D. 1883, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

JAMES R. DOOLITTLE *et al. vs.* CAROLINE M. FORSYTH *et al.*

Assumpsit.

Now come again the parties by their attorneys, and now come also the jury in this behalf empaneled and sworn, and after hearing additional evidence, without concluding the same, the hour of adjournment having arrived, it is ordered that the further trial of the cause be postponed until to-morrow morning.

45 Afterwards, to wit, on the seventeenth day of April, in the adjourned March term of said court, A. D. 1883, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

JAMES R. DOOLITTLE *et al. vs.* CAROLINE M. FORSYTH *et al.*

Assumpsit.

Now come again the parties by their attorneys, and now come also the jury in this behalf empaneled and sworn, and after hearing additional evidence, without concluding the same, the hour of adjournment having arrived, it is ordered that the further trial of the cause be postponed until to-morrow morning.

Afterwards, to wit, on the eighteenth day of April, in the adjourned March term of said court, A. D. 1883, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

JAMES R. DOOLITTLE *et al. vs.* CAROLINE M. FORSYTH *et al.*

Assumpsit.

46 Now come again the parties by their attorneys, and now come also the jury in this behalf empaneled and sworn, and after hearing additional evidence, without concluding the same, the hour of adjournment having arrived, it is ordered that the further trial of the cause be postponed until to-morrow morning.

Afterwards, to wit, on the nineteenth day of April, in the adjourned March term of said court, A. D. 1883, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

JAMES R. DOOLITTLE *et al. vs.* CAROLINE M. FORSYTH *et al.*

Assumpsit.

Now come again the parties by their attorneys, and now come also the jury in this behalf empaneled and sworn, and after hearing additional evidence, without concluding the same, the hour of adjournment having arrived, it is ordered that the further trial of the cause be postponed until to-morrow morning.

47 Afterwards, to wit, on the twentieth day of April, in the adjourned March term of said court, A. D. 1883, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

JAMES R. DOOLITTLE *et al. vs.* CAROLINE M. FORSYTH *et al.*

Assumpsit.

Now come again the parties by their attorneys, and now come also

the jury in this behalf empaneled and sworn, and after hearing additional evidence, without concluding the same, the hour of adjournment having arrived, it is ordered that the further trial of this cause be postponed until Monday morning next.

Afterwards, to wit, on the twenty-third day of April, in the adjourned March term of said court, A. D. 1883, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

JAMES R DOOLITTLE *et al. vs.* CAROLINE M. FORSYTH *et al.*

Assumpsit.

48 Now come again the parties by their attorneys, and now come also the jury in this behalf empaneled and sworn, and after hearing additional evidence, without concluding the same, the hour of adjournment having arrived, it is ordered that the further trial of this cause be postponed until to-morrow morning.

Afterwards, to wit, on the twenty fourth day of April, in the adjourned March term of said court, A. D. 1883, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

JAMES R. DOOLITTLE *et al. vs.* CAROLINE M. FORSYTH *et al.*

Assumpsit.

Now come again the parties by their attorneys, and come also the jury in this behalf empaneled and sworn, and after hearing the concluding evidence, the hour of adjournment having arrived, it is ordered that the further trial of this cause be postponed until to-morrow morning.

49 Afterwards, to wit, on the twenty-fifth day of April, in the adjourned March term of said court, A. D. 1883, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

JAMES R. DOOLITTLE *et al. vs.* CAROLINE M. FORSYTH *et al.*

Assumpsit.

Now come again the parties by their attorneys, and now come also the jury in this behalf empaneled and sworn, and after hearing a part of the arguments of counsel, the hour of adjournment having arrived, it is ordered that the further trial of this cause be postponed until to-morrow morning.

Afterwards, to wit, on the twenty-sixth day of April, in the adjourned March term of said court, A. D. 1883, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

JAMES R. DOOLITTLE *et al. vs.* CAROLINE M. FORSYTH *et al.*

Assumpsit.

50 Now come again the parties by their attorneys, and now come also the jury in this behalf empaneled and sworn, and after hearing further arguments of counsel, without concluding the same, the hour of adjournment having arrived, it is ordered that the further trial of this cause be postponed until Saturday morning next.

Afterwards, to wit, on the twenty-eighth day of April, in the adjourned March term of said court, A. D. 1883, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

JAMES R. DOOLITTLE *et al. vs.* CAROLINE M. FORSYTH *et al.*

Assumpsit.

Now come again the parties by their attorneys, and now come also the jury in this behalf empaneled and sworn, and after hearing further arguments of counsel, without concluding the same, the hour of adjournment having arrived, it is ordered that the further trial of the cause be postponed until Monday morning next.

51 Afterwards, to wit, on the thirtieth day of April, in the adjourned March term of said court, A. D. 1883, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

JAMES R. DOOLITTLE *et al. vs.* CAROLINE M. FORSYTH *et al.*

Assumpsit.

Now come again the parties by their attorneys, and now come also the jury in this behalf empaneled and sworn, and, after hearing the concluding arguments of counsel and receiving the instructions of the court, the jury retired to consider of their verdict, and by agreement of the parties, by their attorneys, in open court, the jury, when they shall have agreed upon a verdict, may sign and seal the same, and deliver it to their foreman and disperse, and the foreman is directed to deliver said verdict to the clerk, and the parties, by their attorneys, further stipulate and agree to waive their

right to poll the jury or to have the jury present in court when the the verdict is opened and read.

52 And afterwards, to wit, on the second day of May, in the adjourned March term of said court, A. D. 1883, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

JAMES R. DOOLITTLE *et al. vs.* CAROLINE M. FORSYTH *et al.*

Assumpsit.

Now come again the parties by their attorneys, and now come also the jury in this behalf empaneled and sworn, and the jury, through their foreman, having delivered to the clerk their sealed verdict, which, being now opened and read by the clerk, is as follows: We, the jury, find the issue for the plaintiffs, and assess the damages at forty thousand dollars. And, thereupon, the defendants, by their attorneys, move the court for a new trial herein.

Afterwards, to wit, on the twenty-fifth day of June, in the adjourned May term of said court, A. D. 1883, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Judgment.

53 JAMES R. DOOLITTLE, JAMES R. DOOLITTLE, Jr., and HENRY MCKEY

vs.

CAROLINE M. FORSYTH, Impleaded with Jacob Forsyth.

Assumpsit.

Now come the parties, by their attorneys, and the court having considered and being now fully advised upon the motion of the defendants heretofore entered herein for a new trial of this cause, overrules the same, and orders that the affidavits of Frederick L. Fake, Charles A. Ekstromer, and Wm. H. Hurt be stricken from the files. And, thereupon, the defendants, by their attorneys, move the court in arrest of judgment; and the court, being now fully advised upon said motion in arrest, overrules the same and awards judgment.

It is thereupon considered and adjudged by the court that the plaintiffs do have and recover of the defendant, Caroline M. Forsyth, impleaded as aforesaid, the said sum of forty thousand dollars, their damages so as aforesaid assessed, together with their costs and charges in this behalf expended, amounting to — dollars and — cents, and that they have execution therefor.

54 On the hearing of said cause the following exceptions were taken and were allowed by the court and made of record, which said exceptions are in the words and figures following, to wit:

Bill of Exceptions.

UNITED STATES OF AMERICA,
Northern District of Illinois, } ss:

In the Circuit Court of the United States for the Northern District of Illinois.

JAMES R. DOOLITTLE, JAMES R. DOOLITTLE, Jr., and HENRY McKEY, Plaintiffs,

vs.

CAROLINE M. FORSYTH, Impleaded with Jacob Forsyth, Defendants.

Be it remembered that on the trial of the above-entitled cause Melville W. Fuller and James R. Doolittle appeared as counsel for the plaintiffs, and William H. King and Frederick W. Packard as counsel for the defendant, Caroline M. Forsyth.

The jurors of the jury were duly examined, accepted by both parties without objection, empanelled, and sworn.

The evidence was voluminous. Besides the oral testimony and depositions the plaintiffs put in evidence written documents, marked as exhibits, and numbered from one to one hundred and twenty.

The evidence on behalf of the plaintiffs tended to establish the facts set out in the five hypothetical statements or questions
55 numbered 1, 2, 3, 4, and 5, which are shown and appear hereinafter in the testimony of Leonard Swett.

Mr. J. R. DOOLITTLE, Jr., on behalf of the plaintiffs, among other things, testified:

I told Mr. Forsyth this: In the first place that we had reached a contract that was accepted by both parties.

Mr. KING, counsel for defendant, objected and said: If the court please, the contract will show for itself what it was. It is not for Mr. Doolittle to get Mr. Forsyth in his office and then explain to him and tell him what he has done and the bearings of the contract. The court will construe the contract itself, but to have him state what he calls the bearings and the great amount of work and labor performed I object to.

The COURT overruled the objection and said: I think any conversation between this witness and Mr. Forsyth upon the subject-matter, or its legal effect, is admissible, tending to show what was done; that is all. If he explained it to him I think he has a right to state that as a part of the work. I don't think any attorney ever had much to do with a complicated contract of this character that he did not find it necessary to explain some of the provisions to his client; that is part of his labor, and the jury will judge.

Mr. KING, counsel for the defendant: The explanatian of the contract to the jury?

The COURT: Yes.

Mr. KING, counsel for defendant: I don't think it is competent.

The COURT: I will allow it.

To which ruling of the court counsel for defendant then and there duly excepted.

56 The witness continued: I told Mr. Forsyth he had come out of the negotiation better than I had hoped for; that we had got a contract acceptable to both parties, and I had swept away all talk about bonds; that I thought that was an immense advantage. We were not now required to look into the power of corporations to acquire land in Indiana; that, although the extension of the option went to the 10th of November, the purchaser must accept or reject by the 10th of September; that as to the extension of the deferred payments during seven years, it made no difference, because, if the interest was not paid, the whole amount would be declared due and a foreclosure made; that interest would have to be paid every fifteen days until the parties gave notice they abandoned the contract; that when Ord signed the contract of June 10th the question of Weston's authority to pay $10,000 was settled.

Objection by the counsel for defendant to the above advice to Mr. Forsyth. Objection overruled; to which ruling counsel for defendant then and there duly excepted.

The witness was asked by plaintiffs' counsel: Do you remember any other point of importance on this passing of the title?

A. Well, there was a matter of some importance connected with the transaction that I have not touched upon yet.

Counsel for defendant said: I object, your honor, to his characterizing whether it was a matter of importance or not. Let him state the facts, and the court and jury will judge of its importance.

The court overruled the objection, and counsel for defendant then and there duly excepted.

The witness continued: It was this: There was a war between Bennett and Hardin, which was linked in with the parties
57 who were purchasing from the Forsyths, and if the latter took sides it might endanger their sale of the land, and Mr. Hardin called at our office and we had a long interview there in regard to this matter, during which witness advised him that the Forsyths could not take sides with him, while, at the same time, the ground they took in relation to riparian rights was the same ground taken by Hardin.

A. J. AVERILL testified: Engaged in the real estate business, in the city of Chicago, 22 years; have examined the Forsyth tract of land; is composed largely of swales and sand ridges; not to exceed 1,000 acres in the 8,000 tract could be cultivated; nearest point about 16 miles from court-house in Chicago; by expenditure of a good deal of money it might be suitable for manufacturing purposes; harbor would have to be opened into Wolf Lake from Lake Michigan; should think it purely speculative property, its chief value being for development by construction of harbor facilities for transaction of commercial business; is not suitable for farming, but its proximity

to Chicago makes it possible; in future developments about the city it might be available for manufacturing and other purposes as a suburb of Chicago.

Counsel for defendant objected to the witness testifying as to the character of the land and its adaptability or otherwise to farming or other purposes, and as to its being speculative property or the contrary. Objection overruled by the court; to which ruling counsel for defendant then and there duly excepted.

58 JOSEPH B. CHANDLER testified: That he knew plaintiffs and Jacob Forsyth; that in November, 1881, after consummation of sale, he met Mr. Forsyth and Mr. Doolittle, Jr., and congratulated Forsyth upon his successful negotiation of his property, and that Forsyth, with a waive of the hand and a very graceful bow, turned to Mr. Doolittle, and remarked that witness should congratulate Mr. Doolittle.

Said conversation objected to by counsel for defendant, as immaterial. Objection overruled, and exception to such ruling by counsel for defendant.

ISAAC N. HARDIN testified: That he had conversation with Mr. Forsyth relative to Weston option contract, after contract was given and before Weston returned from New York; that Forsyth said he was fearful Weston would not carry out the arrangement, and that the paper given Weston might complicate the land, and perhaps prevent sale through other channels, and desired to make demand on Horne for return of the paper or completion of the arrangement, and desired witness to go to Belt Line office and witness such demand; that other parties were trying to negotiate for purchase of the land, and he had kept them off in view of this matter with Weston, and asked advice of witness as to propriety of opening such negotiations; that one party desired a price to be set on the land; and that price was $600,000.00; that he would have to pay commission, and the amount realized would be considerably less than $600,000; he desired my advice; that witness advised him he had better sell for any substantial sum above the mortgage, and not to let the opportunity pass to get two or three hundred thousand dollars above the mortgage, and not to wait longer upon
59 Weston; that after the sale took place Forsyth said to witness, it had been his very great good fortune in securing Judge Doolittle and his son as his counsel; that, giving character to the transaction, had aided largely the result of the sale.

Counsel for defendants objected to the testimony of this witness, and moved to strike out the same as immaterial; which objection and motion were overruled, to which ruling counsel for defendants duly excepted.

Deposition of Joseph P. Ord Read.

JOSEPH P. ORD testified: Know all the parties to the suit. First met Mr. Doolittle, Jr., July 11th, 1881; met the Forsyths about the

same time; made a contract in writing with the Forsyths in 1881. (Contract introduced in evidence, "Plaintiffs' Exhibit 5," shown elsewhere.) I think it was signed in May, in New York; gave it to my attorneys, Alexander & Green, to send to Chicago for signatures of other parties. There was no agent of mine in Chicago for that purpose. It was probably sent by Alexander & Green to Milton Weston. Weston had no authority from me to alter or modify the terms of that contract.

Objection by counsel for defendant to the last statement of the witness and the question calling out such answer. Objection overruled, to which ruling counsel for defendant then and there duly excepted.

Weston was a mere messenger. I cannot recall when I first saw the contract of June 10th. Went to Chicago with reference to it about July 10th.

Witness testified to interviews and discussions in July,
60 between himself, Mr. Mason, Mr. Simpson, and Mr. Doolittle, Jr., relative to the contracts, substantially as testified to by Mr. Doolittle, Jr.

Counsel for defendants objected to the testimony of the witness in relation thereto as incompetent and immaterial; which objection was overruled by the court; to which ruling counsel for defendants then and there duly excepted.

Two supplemental clauses submitted July 21st. (Introduced in evidence, marked, respectively, "Plaintiffs' Exhibits 6 and 7.")

Counsel for defendant objected to the same, and each thereof, as immaterial, irrelevant, and incompetent. Objection overruled by the court; to which ruling counsel for defendant then and there duly excepted.

Mr. Simpson arrived in Chicago July 27th, and left August 6th; contracts of June 10th and August 4th executed by me at the same time. In these interviews Mr. Doolittle assumed to represent Mrs. Forsyth; saw Mr. Doolittle in New York. He wanted the mode of payment as provided in the contracts modified; wanted to raise some money, about $100,000, by anticipation of the payment of $333,000, and proposed the security of a mortgage; declined the proposition about the money; arrived at and executed an agreement, dated September 28th. The first time that a contract existed between me and the Forsyths was when I signed the contract dated June 10th, and that of August 4th, which was on the 5th day of August.

Objection by counsel for defendant to the witness testifying to a
61 conclusion, not stating facts. Objection overruled by the court; to which ruling counsel for defendant then and there duly excepted.

Was instructed on going to Chicago to secure execution of a contract identical with the one I had sent, or as near thereto as possible.

On my arrival there said to Mr. Doolittle and Mr. Forsyth that unless the contract I had executed was signed the business was off.

Objection by counsel for defendant to what the witness stated as immaterial, incompetent, and irrelevant. Objection overruled; to which ruling counsel for defendant then and there duly excepted.

Upon his cross examination by Mr. KING, as counsel for the defendant-, Mr. ORD testified as follows:

Question by Mr. KING, counsel for defendant: Have you any interest in James R. Doolittle, Jr., particularly?

A. I have a social and friendly interest in him.

Q. No pecuniary interest in Mr. Doolittle?

A. Certainly not. I have no interest whatever in this matter in any way, shape, or form, except I am anxious to testify to the great ability which Mr. Doolittle showed, both as a lawyer and a negotiator, holding up the price of this land in a long series of negotiations, when he was dealing with men who are very shrewd, and one of whom is noted as being particularly able in making what is called a trade. I am glad to testify to it. I have given up a great deal of time in coming to this office, in order that Mr. Doolittle may have the benefit of my knowledge of the facts in this transaction, because I want to see him paid for his services, and because, so far as I am concerned, I would be glad that it should be generally known how much ability, how much zeal, how much legal knowledge he
62 showed in all these transactions, which, I believe, were carried on and were completed entirely by his efforts.

Mr. KING (interrupting): Your belief is not asked for, and I object, and ask that your belief be stricken out as immaterial and incompetent testimony.

Objection and motion overruled, and exception by counsel for defendant.

The witness continuing: Then I desire to state as a fact that this whole negotiation was conducted with Mr. Doolittle.

The witness was asked by plaintiffs' counsel his opinion as to the character and the professional quality of the services rendered by the plaintiffs in the negotiations, to which witness testified, limiting his opinion to the facts which transpired under his personal observation.

Counsel for defendant- objected to the question; that the witness should state facts, and leave it for the jury to form conclusions, and that it was not the province of the witness to state his conclusions or opinions. Objection overruled by the court; to which ruling counsel for defendant then and there duly excepted.

The witness answered that the character of the services was a double, or, rather, a dual one. First, there was a negotiation—I may say the trade—and in all this trade, in Mr. Doolittle Jr.'s participation in the transaction, he showed a great deal of confidence, and

his whole bearing in these negotiations was such that it did not occur to me that any attempt to bargain—I mean to cut down—the sum which had been suggested, to wit, a million dollars, would be successful. He seemed very reliant, and the best evidence, to my mind, of the character of this transaction was its success, viz., that we paid the price he asked. At the end of several weeks' dis-
63 cussion, extending all over this matter, Mr. Doolittle obtained my signature to the contract, agreeing to pay the price which he had asked, or which his clients had asked. I consider that negotiation to have been a very successful one on the part of Mr. Doolittle. As to the quality of his services, they were of a very high order, in my judgment, of ability; unusually so.

Answer of witness objected to by counsel for defendant-. Objection overruled; to which ruling counsel for defendant- then and there duly excepted.

Witness continuing: Was admitted as a lawyer in New York in 1877; have practiced law very little; almost none, in the sense of trying cases; was generally connected with business that had elements of law in it—general sort of business; have always done business for lawyers, and my associations have always been with them. I was protected by a bond of indemnity, by the promoters, against personal liability on my part in the transaction.

John W. Simpson's Deposition Read.

JOHN W. SIMPSON testified: Am a lawyer in New York city; connected with the firm of Alexander & Green; first met the plaintiffs in Chicago in the latter part of July, 1881; that he came as counsel for Mr. Ord, the purchaser.

Witness testified to interviews and discussions, as attorney and counsel for the purchaser, with James R. Doolitte, Jr., as attorney and counsel for the defendants, relative to the contracts,
64 substantially as testified to by Mr. Doolittle, Jr.

Witness testified as follows:

Q. Do you remember whether Mr. Doolittle, in the negotiation with you upon this subject, required the acceptance by Mr. Ord of the contract of June 10th, 1881, which had been executed by Mr. and Mrs. Forsyth?

A. Yes, I remember that that was a subject of considerable discussion between us in this way: We took the position that the contract of June 10, 1881, which was no contract, in the sense that it was executed by only one party; we took the position that it was of no binding force at all; we could not accept it, and we would not execute it. Mr. Doolittle, Jr., all through the discussion, put forward the point that this agreement, which was to embody the ultimate result of the negotiation, should be drawn on the theory that it was a modification of the agreement of June 10, 1881; in other words, we were not to start *de novo*, but to start with the agreement of June 10th in force, and modify it to suit the views on both sides.

Q. When was the contract of June 10th accepted by Mr. Ord?

A. Simultaneously with the execution of this paper—(the contract of August 4th.)

Q. When and by what mode, if at all, was an agreement reached between Joseph P. Ord and Caroline M. and Jacob Forsyth?

A. An agreement was reached between them when this paper and the so-called agreement of June 10th were executed; I refer to the contract of August 4th; the purchasers did not consider themselves as bound until the contract of August 4th was executed.

65 Counsel for defendant- objected to the last statement of the witness. Objection overruled by the court; to which ruling counsel for defendant then and there duly excepted.

Q. In the negotiation which occurred between you, or the interviews which occurred between you and the plaintiff, J. R. Doolittle, Jr., at Chicago, what, if anything, did you state as to the authority of Milton Weston to make the payment of $10,000 upon the contract of June 10th?

Objected to as incompetent and immaterial.

A. I stated that Mr. Weston had no authority to make that payment of $10,000 except upon the execution and delivery of this contract. (Plaintiffs' Exhibit 5.)

Last statement of the witness objected to. Objection overruled; to which ruling counsel for defendant- then and there duly excepted.

Witness stated: Was admitted to the bar in June, 1873; have been engaged in the real estate branch of the legal business of Alexander & Green, examination of titles and foreclosing mortgages; since 1880 have been engaged in corporation business; some of the matters were of importance, involving large amounts; have been engaged in negotiations between parties—not as negotiator myself, but knew what transpired. So far as I was concerned, J. R. Doolittle, Jr., and J. R. Doolittle, Sr., represented the Forsyths.

The witness stated that he was acting as attorney and counsel for the purchasers.

Witness was asked by plaintiffs' counsel this question: Are you able to state, from the participation which you personally had in the negotiations with the plaintiffs at Chicago and New York, the character and quality of the services rendered by the plain-
66 tiffs in the said negotiations in which you took part?

Counsel for defendant- objected thereto as incompetent and immaterial; that the witness should state facts, not state conclusions or opinions, as to the quality or character of the services. Objection overruled; to which ruling counsel for defendant- then and there duly excepted.

Witness, in answer, stated that in his judgment the services of the plaintiffs in behalf of the defendants in the matters testified to by the witness were of the very highest character and of the very best quality; that, in the judgment of witness, plaintiffs managed the

case with great sagacity and with great skill; that such was the opinion formed by witness at the conclusion of the business.

Above answer objected to by counsel for defendant- as incompetent; that the witness should detail facts, not state conclusions. Objection overruled; to which ruling counsel for defendant then and there duly excepted.

Witness was asked by plaintiffs' counsel to state from his position in such negotiations as occurred while he was at Chicago, as the counsel of Mr. Ord, whether he could state who it was who brought about the agreement of the parties expressed in the contracts referred to as the contracts of June 10th and August 4th.

Objected thereto by counsel for defendant- as incompetent for witness to state the conclusions called for; that it was a question for the jury to determine from the facts shown by the evidence. Objection overruled by the court; to which ruling counsel for defendant then and there duly excepted.

67 In answer witness stated that those contracts were brought about by Mr. Doolittle, Jr., with the aid, in one or two emergencies (I am stating simply what I know of my own observations), of Mr. Doolittle, Sr., on the one side, and Senator Barnum and myself on the other.

Witness, in answer- further, testified: Execution of the contracts by Ord was secured by the services of plaintiffs; that was not an opinion; the witness knew that to be a fact.

Answer objected to for the same reasons last above mentioned. Objection overruled; to which ruling counsel for defendant then and there duly excepted.

Witness further testified: In general I knew the situation upon the other side of the negotiation at that time. I knew that that situation was such, although the plaintiffs may not have known it, that it was a very delicate and difficult matter to carry those negotiations to a successful conclusion. I knew that the matter of time was a serious element in the situation; that a delay of a few weeks in concluding that negotiation would have ended it. I fancy that a delay of a few days would have ended it; and the manner in which that appears significant to me, as to the value of the services of the plaintiffs, is this: If the plaintiffs had not been sagacious enough to persuade us that they were entirely indifferent to the success of this negotiation; that they had fixed their terms and their price, and would stand to them or lose the sale; if we had been led to doubt that we would have to pay the price stated for the land, and take it on the terms stated finally, we should not have closed the negotiations. That we did not have any such doubt was owing to the judgment of the plaintiffs. If we had not taken it then, if we had
68 stopped to dally for a lower price and compare terms, the time would have gone by when we would have taken it at all, or else we would have had it at a very much lower price.

The above statement and testimony of the witness was objected to by counsel for defendant- as immaterial, incompetent, and irrelevant, as giving the impressions and opinions of the witness, and not detailing facts. Objection overruled by the court. To which ruling counsel for defendant then and there duly excepted.

William D. Gulliver's Deposition Read:

WILLIAM C. GULLIVER testified: Am a lawyer in New York city; know about the contracts between Ord and Forsyth; saw Defendant's Exhibit "A" latter part of May; was engaged in drawing contract between Ord and Mrs. Forsyth and Jacob Forsyth; prepared contract shown as Plaintiffs' Exhibit 5; mr. Milton Weston first brought the subject-matter to my notice.

Witness was asked what representations Weston made in regard to the payment of the million dollars for the land.

Objected to by counsel for defendant- as immaterial, incompetent, and irrelevant, and the objection was sustained by the court. But afterwards, during the progress of the trial, evidence having been given tending to show that Weston was acting as the agent for, and in behalf of, the Forsyths in the negotiation of the sale of the land to the New York parties, the court overruled the objection and allowed the answer of the witness to the question to be
69 read to the jury; to which counsel for the defendant- excepted.

In answer, witness testified: Weston's statement to me was something to this effect: That a contract in the nature of an option could be had extending over a reasonable time, represented to be flexible, to be secured by a payment in cash of $10,000. That the owner of the land wanted the equivalent of a million of dollars for these 8,000 acres. That, for certain reasons which he named, they wanted one-third of this sum to be paid at the expiration of this option, whenever that should occur upon the date, to be made in cash; that the remaining two-thirds of a million could be paid either in bonds of a company to be organized for the acquirement of the property or by conveyance or reconveyance to the grantors of an undivided two-thirds of the property, or by any sort of an arrangement which would secure the grantors practically one-third of a million in cash and a reasonable equivalent for the other two-thirds of a million. That the first one-third of a million was to be paid in cash; that the remaining two-thirds was open to negotiation.

Answer objected to as incompetent, improper, and irrelevant, and immaterial, by counsel for defendant-. Objection overruled. To which ruling counsel for defendant then and there duly excepted.

Contract shown as Complainants' Exhibit 5 was signed by Ord and handed to Weston to be delivered to Mr. and Mrs. Forsyth on execution of duplicate by them. At the same time I gave Weston a check for $10,000, to be used in making first payment on this con-

tract, as drawn by me, whenever the duplicate of the contract should have been executed and delivered to him by Mr. and
70 Mrs. Forsyth.

Witness was asked as to what limitation to the power of Weston was imposed by him, and if a receipt was taken from him.

Objection thereto by counsel for defendant-. Objection overruled; to which ruling counsel for defendant- then and there duly excepted.

Witness answered that he did impose limitation, and produced a receipt.

Said receipt offered in evidence. Objection thereto by counsel for defendant-. Objection overruled; to which ruling counsel for defendant- then and there duly excepted.

Said receipt is as follows:

"NEW YORK, *June 1st*, 1881.

"Received from William C. Gulliver, trustee, ten thousand dollarst, to be used by me in making first payment on the contract between Jacob Forsyth and wife and Joseph P. Ord, dated June —, 1881, the same not to be paid by me or used until the blanks existing in said contract shall have been correctly filled in, and until the description of the land therein contained shall have been verified and made entirely correct, and until the said contract shall have been executed and delivered by the said Forsyth and wife; also $100 on account of general expenses.

"CHICAGO BELT LINE RAILROAD COMPANY.
"(Signed) MILTON WESTON, *President.*"

I never was consulted about it (the contract of June 10). I may have seen it since. I cannot be positive about that. I know I did not see it before execution, because I never would have per-
71 mitted the parties to have signed the contract if I had seen it, or been consulted about it.

Objected to by defendants' counsel as irrelevant and incompetent. Objection overruled; to which ruling counsel for the defendant- then and there duly excepted.

Took part in the consummation of the sale; gave Messrs. Mason instructions in regard to form of the deed; went to Chigago with funds to make the payment; was at Crown Point when the papers were exchanged. So far as I could see, Mr. Doolittle, Jr., directed all the details of the transaction on behalf of the Forsyth; met him at Indianapolis in regard to proceedings there, referred to in the contract, relative to bill to redeem; have practiced law about twelve years.

Witness was asked as to what class of matters or transactions he had been engaged in professionally.

Objection by counsel for defendant. Objection overruled; to which ruling counsel for defendant then and there duly excepted.

In answer, witness stated he had been connected with some important matters; almost exclusively represented corporations in the matter of the organization of corporations, railroads, life and fire insurance companies, railroad companies, real estate companies, manufacturing companies of all sorts, mining corporations, and matters connected therewith, litigated or otherwise; also participated in negotiating for the purchase of property involving large amounts; that his experience in the matter of negotiating contracts had been such that he could state an opinion in regard to the value of services in the matter of negotiating contracts involving large amounts.

Above answer objected to by counsel for defendant-. Objection overruled; to which ruling counsel for defendant- then and
72 there duly excepted.

Witness further stated, on cross-examination, that he had had professional business with lawyers in Chicago and in other cities; that he had considerable familiarity with the usual and customary charges of lawyers in the city of Chicago in regard to legal services, and that he had found a want of uniformity of charges of lawyers in Chicago; had paid bills of lawyers in Chicago, in a number of instances, for professional services, during the last ten years, of almost all kinds, viz: Williams & Thompson, Van H. Higgins, Leonard Swett, E. B. McCagg, or his firm, Trumbull's firm, Trumbull & Trumbull, and Mason Bros.

It further appeared, on cross-examination, that, in connection with his New York practice, the witness had been engaged in special cases in the States of Vermont, Connecticut, Ohio, Pennsylvania, Georgia, Indiana, Illinois, the Province of Ontario, Canada, State of New Jersey, and in other States, indirectly in the management of affairs, or litigations connected with clients in the State of New York; that his practice in Illinois was mostly in railroad foreclosures in the U. S. circuit court, and for a couple of years he had charge of a patent suit pending before Judge Drummond, in Chicago; had been associated with the firm of Alexander & Green for about ten years; declined to state in what capacity.

The counsel for the plaintiff- then propounded to the witness a printed hypothetical statement and question. (Said statement is in the same words as shown as hypothetical statement No. 1, in the testimony of Leonard Swett.)

The witness having testified that he had read said question was then asked to answer the same.

Said question was objected to by counsel for defendant,
73 on the ground that witness had not been shown to know the usual and customary fees charged by lawyers in Chicago, where plaintiffs were employed and where their office was during such employment, and, therefore, the witness is not competent to testify; that to enable the witness to be competent to testify on the subject of plaintiff's fees the witness must know, and the facts must show, that he knows what are the usual and customary fees usually charged by lawyers in Chicago for like services or for similar services; that the question is improper to be put to any witness, and es-

pecially to this witness; that a large portion of the question is based upon an assumption contrary to the facts; that the witness is incompetent to testify on the subject. The question was also objected to on the trial for the same reasons as set forth elsewhere in the objections to the hypothetical questions in testimony of Leonard Swett. Objections overruled. To which ruling counsel for defendant then and there duly excepted.

Witness answered that the strictly legal services indicated in the question, viz., interpretation of the various contracts, drawing of the contracts, and advice as to their legal effect, was worth $5,000; that, as witness understood the facts set forth in the question, plaintiff's services were, to a large extent, extraprofessional, that of negotiators, by which the defendants seemed to have been saved a considerable sum of money; and for these services, as distinguished from the strictly legal services, I should regard a proper compensation about $40,000.

74 The witness was asked by plaintiffs' counsel the following question:

Has your experience in the matter of the negotiation of contracts involving amounts of a quarter of a million and upwards been such that you can state an opinion in regard to the value of services in the matter of negotiating contracts of that character?

Objected to by defendants' counsel as immaterial and incompetent.

The COURT to the reporter: Put it down that Mr. King objects to every question and let him have an exception.

Mr. KING: And an exception to everything.

The COURT: Yes.

The witness answered, yes.

LEONARD SWETT, called by plaintiffs, testified:

Am a lawyer; practiced law since 1849; in Chicago since 1865.

Five hypothetical statements or questions were read by the counsel for the plaintiffs in the presence of the court and jury, and certain members of the bar of Chicago called and sworn as expert witnesses.

Said questions are in five parts, and are numbered 1, 2, 3, 4, and 5, respectively, such of the plaintiffs' exhibits as are set out therein being noted on the margin by its number in each.

75 Hypothetical statement No. 1 is as follows:

Assuming the facts hereafter stated, hypothetically, to be true, to wit, that the defendant, Caroline M. Forsyth, in the year 1881, was, and for many years before that time had been, the owner of a large tract of land, comprising about eight thousand acres, situate in the northwesterly part of Lake county, in the State of Indiana; portions of the land fronted upon Lake Michigan, other portions upon Wolf Lake and Wolf river and upon the Grand Calumet river.

The land is low and in many places wet. Only a small portion of it had ever been cultivated, and a large portion of it was not

capable of cultivation, and, as a whole, was of comparatively small value for agricultural purposes. The nearest portion of the tract was about fourteen miles from the court-house, in the city of Chicago, Cook county, Illinois, in a direct line, and the remotest point about twenty miles distant from said court-house; but the land was capable of use for manufacturing and business purposes. It was crossed by several lines of railway, going east of Chicago, and it was possible, by the expenditure of large sums of money, to open a harbor which would enable the water craft of Lake Michigan to enter Wolf Lake, and by the dredging of Wolf Lake to form a good harbor located almost at the foot of Lake Michigan; but, in order to realize a large income from this property, the expenditure of large sums of money in its improvement was necessary.

In 1875, Mrs. Forsyth (her husband, the defendant, Jacob Forsyth, joining in it) placed a mortgage or trust deed to one Pierson upon the property to secure notes for $163,000, payable without interest on the first of October, 1880, the actual contract of loan being for $100,000 only, and the $63,000 of notes above that sum being given to pay the interest on the loan at the end of five years, the income from the property not being at the time of the making of the loan, nor at any time up to the year 1881, sufficient to pay the interest at ten per cent. upon a loan of $100,000, and the loan was made without the payment of any interest until the expiration of the period of five years.

Neither Mrs. Forsyth nor her husband had sufficient means from any other source to pay the interest upon the loan.

The indebtedness secured by the mortgage was not paid at the time when it matured.

The taxes on portions of said land for the year 1878 were not paid by the Forsyths, but were paid by the trustee under said trust deed February 7, A. D. 1880, amounting to $1,394.62. The taxes on portions of said land for the year 1879 were not paid by the Forsyths, but were paid by said trustee on February 12, 1881, amounting to $1,425.40.

76 Aquilla Adams and others, in October, 1880, claiming to be the holders of the notes given by Mrs. Forsyth and her husband, Jacob Forsyth, filed a bill in the county where the land was situated to foreclose the mortgage. The suit was transferred to the United States circuit court for the district of Indiana, and was pending there until the 25th of October, 1881, when it was dismissed voluntarily by the complainants.

Jacob Forsyth had made several efforts on behalf of his wife to sell the property, but without success. The value of the land was mainly prospective, for the uses to which it might be put by the growth, development, and commercial necessities of the city of Chicago.

In 1880 Jacob Forsyth, representing himself to be the owner of the tract, endeavored to make a sale of the property to some parties in London, England, among whom were John Petherick and John Studdy Leigh.

The price which he asked for the land was one million dollars, to

be paid partly in cash and partly in the shares of an incorporated company, which was to be formed to take the title. Mr. Forsyth executed a power of attorney to John Petherick, authorizing him to make a preliminary contract of sale of the Forsyth estate upon terms and conditions to be contained in a letter of instructions, and Mrs. Forsyth, in consequence of some discussion as to her husband's authority, addressed a letter to Studdy Leigh, stating that her husband always acted for her and as her agent in negotiations for the sale of the Forsyth estate.

Mr. Forsyth, acting for himself and as the agent of Mrs. Forsyth, consulted with the plaintiffs, Doolittle and McKey, consisting of James R. Doolittle, J. R. Doolittle, Jr., and Henry McKey, a firm of attorneys in good standing, having their office in the city of Chicago, State of Illinois, in regard to whether the land owned by Mrs. Forsyth was bound, and whether the title to it could be affected, by the papers which Mr. Forsyth had signed, and by the letter which Mrs. Forsyth had signed, stating that it was rumored that Petherick had made a contract of sale. Mr. and Mrs. Forsyth were advised by the said attorneys that the land was neither bound nor could be affected by the papers which had been executed. This occurred some time in January, 1881.

The Forsyths soon disentangled themselves from the Petherick and Leigh parties, terminating the negotiations looking to the sale of the Forsyth estate in that direction, and commenced operating in other quarters to secure a sale. About April, 1881, Mr. Forsyth informed the plaintiffs that there were were two prospects for a sale; one to a syndicate, represented by George L. Dunlap, and another to the Belt Line railroad. The plaintiffs advised that great care should be exercised in giving any papers or contracts touching the
77 lands, and Mr. Forsyth stated that no writing should be signed until it had been submitted to said attorneys and received their approval.

At this time the plaintiffs were retained as attorneys and counsel by the defendants, Caroline M. Forsyth and Jacob Forsyth, to assist in and advise in regard to the sale of said lands, and in the defense of the suit to foreclose said mortgage, and in any other matters affecting the interest of said Forsyths which might arise.

In May, 1881, he stated to the plaintiffs that he had had interviews with Milton Weston, the manager of the Belt Line railroad, and that said manager wanted a statement in writing containing a definite proposal from the Forsyths for the sale of the lands, which he could present to his principals in the city of New York for their consideration.

Mr. Forsyth shortly after presented to the plaintiffs a draft of an agreement between himself and Milton Weston, and stated that he did not know whether Weston could make a contract or not, but that he did not wish to become again complicated by any such papers as he had given to Petherick, and requested that it should be modified in such a way as to mean nothing more than a statement that the land could be had for a million dollars, reserving the right to withdraw from it at any time, and stated that he proposed, on the

payment of ten thousand dollars, to give Weston a sixty-day option to purchase the lands for one million dollars, one-third cash, and the balance on time.

The plaintiffs made modifications in writing, and it was signed by Jacob Forsyth alone, the title to the land being in his wife, Caroline M. Forsyth.

About the last of June, 1881, Mr. Forsyth brought to the plaintiffs a form of contract between Jacob Forsyth and Caroline M. Forsyth and Joseph P. Ord (signed by said Ord), and it was submitted to said plaintiffs for their examination. The contract thus tendered was as follows:

PL'FFS' EX. 5.

"Articles of agreement made this —— day of ———, in the year of our Lord one thousand eight hundred and eighty-one,

"Between Jacob Forsyth, of North Township, county of Lake and State of Indiana, and Caroline M. Forsyth, his wife, parties of the first part, and Joseph P. Ord, of the borough of Princeton, county of Mercer, and State of New Jersey, party of the second part—

"Witnesseth, that if the party of the second part shall first make the payments and perform the covenants hereinafter mentioned on his part to be made and performed, the parties of the first part, each
78 for himself and herself, hereby covenant and agree to convey and assure to the said party of the second part, within the ninety days next succeeding the execution and delivery of this contract, in fee-simple, clear of all incumbrances whatsoever by a good and sufficient warrantry deed, the lots, pieces, or parcels of ground situated in the county of Lake, and State of Indiana, known and described as follows: The west half of the southwest quarter of section six; the northwest quarter of the northwest quarter, and the south half of the northwest quarter, and lots one, two, three, and four in the south half of section seven; the west half of the southwest quarter of section eight; N. E. fr'l quarter, the east half of the southeast quarter, and the west half of the southwest quarter of section sixteen; lots one and two fr'l southeast quarter of section fifteen; the north half, except the southeast quarter of the northeast quarter, and the south half, except the northeast of southwest quarter of section seventeen; lots three and four of the southeast fr'l quarter of section eighteen; lots one and two in the north half and the southeast quarter of the northeast quarter, and lots three and four in the south half and the southeast quarter of section nineteen; all of section twenty; all of section twenty-one; lots one and two in the west half; the west half of the southeast quarter, and the southeast quarter of the southeast quarter of section twenty-two; all of sections twenty-seven, twenty-eight, and twenty-nine; the northeast quarter and the north half of the northwest quarter, and the north half of the southeast quarter, and the southeast quarter of the southeast quarter of section thirty; lots one and three, and the south half, north of the river, of section thirty-two; the north half and the south half, north of the river, of section thirty-three; the north half, and lots one, two, three, and four, in the south half of

section thirty-four; the west fr'l half of the southwest quarter, and lot four in section thirty-five, all in township thirty-seven north, range nine west; also lots one, two, and three in the northeast and southeast fr'l quarter of section one; lots one, two, three, and four in section twelve; lots one and two in section thirteen; lots two and three, and the southeast quarter of the southeast quarter, and the west half of the north half of the southwest quarter of section twenty-four, all in township thirty-seven north, range ten west, containing in all eight thousand acres, more or less, being all the land owned in said county by the parties of the first part.

"And the said party of the second part hereby covenants and agrees to pay to the said parties of the first part, in consideration of said conveyance, the sum of one million dollars in the manner following:

"First. Nothing herein contained is to be construed as an
79 obligation on the part of the party of the second part to pay any sum exceeding three hundred and thirty-three thousand three hundred and thirty-three dollars and thirty-three cents within ninety days from the date of this contract, if he elect to complete said purchase, or more than ten thousand dollars if he elect, as hereinafter provided, not to complete said purchase.

"Second. Ten thousand dollars cash shall be paid by the party of the second part to the parties of the first part contemporaneously with the execution and delivery of this agreement, the receipt of which payment is hereby acknowledged.

"Third. Three hundred and twenty-three thousand three hundred and thirty-three dollars and thirty-three cents in cash shall be paid by the party of the second part to the parties of the first part within ninety days next succeeding the execution and delivery of this agreement, upon delivery to the party of the second part by the parties of the first part of a good and sufficient warranty deed conveying to the party of the second part in fee-simple, clear of all incumbrances whatsoever, all of the lots, pieces, and parcels of land hereinbefore described. If, at the expiration of said ninety days, the said three hundred and twenty-three thousand three hundred and thirty-three dollars and thirty-three cents shall not have been paid by the party of the second part, a tender of said deed having been theretofore duly made as herein provided, then in that event the ten thousand dollars already paid by the party of the second part shall be and become thereby forfeited to the parties of the first part as full satisfaction and in liquidation of all damages sustained by the parties of the first part by reason of such breach of contract, and thereupon and thereby this contract shall become terminated, cancelled, and of no effect, and the parties of the first part shall have the right to re-enter and take possession of the premises aforesaid.

"Fourth. The residue of the amount due to the parties of the first part, in accordance with the terms of this contract, for the lands hereinbefore described shall be paid by the party of the second part at his option, either in cash, in four equal annual instalments, dating from the day of the execution of this contract, with interest upon the amount so remaining unpaid at the rate of six per centum per

annum, to be paid annually, to be secured by a first mortgage on the property so conveyed, or, at the option of the party of the second part, the said principal sum may be paid at any time within the said four years.

"It is further mutually agreed by and between the parties hereto that the said residue of the amount due to the parties of the first part in accordance with the terms of this contract may, at the
80 option of the party of the second part, be paid either in cash, as hereinbefore provided, or in twenty years' first mortgage bonds at par of the East Chicago Improvement Company, to be hereafter organized by the party of the second part and his associates or assigns, which bonds shall be secured by a mortgage on the lands conveyed hereunder, or on such larger amount of lands, or on such other lands as shall afford a security equal to that of the lands hereby agreed to be conveyed, the payment of which bonds shall be guaranteed by the Chicago Belt Line Railroad Company.

"It is further mutually agreed by and between the parties hereto that the said residue of the amount due to the parties of the first part in accordance with the terms of this contract may, at the option of the party of the second part, be made, instead of in cash or bonds, as hereinbefore provided, by a conveyance to the parties of the first part of an undivided two-thirds interest in the lands conveyed by the parties of the first part in compliance with this contract, which conveyance by the party of the second part of such undivided two-thirds interest shall operate as a full payment and satisfaction of all the claims of the parties of the first part under this contract

"Fifth. It is further mutually agreed by and between the parties hereto that before making any payments hereby agreed to be made by the party of the second part, except the first payment of ten thousand dollars, he shall be satisfied that the conveyance hereby contracted to be made to him will convey to him a good and sufficient title to the lands so conveyed and hereinbefore described in fee-simple and free from incumbrances of any sort.

"In witness whereof the said parties to these presents have hereunto set their hands and seals the day and year herein written.

"J. P. ORD.

"Signed, sealed, and delivered in the presence of—
"A. B. THATCHER, as to J. P. Ord."

The plaintiffs being at that time engaged in the preparation of an answer in the suit to foreclose the Pierson mortgage, advised the Forsyths that it would be impossible for them to execute such an agreement because the title was encumbered, and because it would be impossible for the Forsyths to remove the encumbrance without a sale of the property, and in case said Ord should not conclude to purchase the property the Forsyths could not tender a deed of the property free from all encumbrances, and would be obliged to pay back the $10,000 received on the delivery of the contract.

The plaintiffs also objected to another clause of the contract:

On the ground that the bonds which might be issued by
81 the Improvement Company were not limited in amount, and advised the Forsyths, first, that, if unlimited, the cash value of such bonds would depend wholly upon the value of the property upon which they were secured; and,

Second. The company might include other lands in the mortgage (which it might give) securing the bonds, and leave an open question for future determination as to the relative value of the other property included in its mortgage in comparison with the property to be conveyed by Mrs. Forsyth; and,

Third. That it would enable the company to place the mortgage securing its bonds upon lands wholly distinct from those to be conveyed by Mrs. Forsyth, and leave an open question to be determined in the future whether such other lands should or should not afford a security equal to the lands to be conveyed by Mrs. Forsyth.

The plaintiffs objected to another clause in the agreement on the ground that, in case Ord should elect not to complete the purchase of the entire tract after the payment of one-third of a million, he would be entitled to become the owner of an undivided one-third interest in the lands, and would not be compelled to pay any more money; and the plaintiffs advised the defendants that in case such a result should occur he (Mr. Ord) would be enabled to file a bill in partition and break up the estate into fragments, or so shatter the single ownership as to impair the future sale of the two-thirds of the property, which might be reconveyed to Mrs. Forsyth.

It was stated to the plaintiffs by Mr. Forsyth that the manager of the Chicago Belt Line Railroad Company was prepared, upon the execution and delivery of the contract, to pay to Mrs. Forsyth the sum of $10,000, and that she was very desirous, if possible, to execute an agreement of some sort which would enable her to get the $10,000.

It was discovered (by the plaintiffs and Mr. Forsyth on a comparison of descriptions) that the agreement failed to describe in several instances correctly portions of the property owned by Mrs. Forsyth, and for this reason the plaintiffs advised the defendants against the execution of the paper.

Three lines of railway crossed the property, and the plaintiffs advised the defendants that it would be impossible for them to convey and give possession of the railroad rights of way. Highways—roads—were also in existence across portions of the property, and (the plaintiffs advised the defendants that) they could not give possession of the property included in such highways.

In answer to an inquiry made by the plaintiffs as to the condition of the title the defendant, Jacob Forsyth, stated that the title to a
portion of the lands owned by his wife, which she intended
82 to include in the sale, was not perfect of record. The plaintiffs advised the defendants that all of said lands to which the title of Mrs. Forsyth was imperfect of record should either be kept out of the contract or a provision should be inserted that the purchaser should not object to the sufficiency of the title to such portions of said lands.

The plaintiffs were requested by the defendants to call upon the manager of the Belt Line road, Mr. Weston, and state to him the reasons why the said contract drawn in New York could not be signed by the defendants. One of the plaintiffs, J. R. Doolittle, Jr., called upon Mr. Weston, at the office of the company, two or three times upon the subject. At the first interview said plaintiff asked for information as to why the contract had been drawn with Joseph P. Ord instead of with Milton Weston, to whom Mr. Forsyth had delivered the statement or proposal before referred to. Mr. Weston stated in reply that his parties in New York desired to have the contract drawn in the name of Mr. Ord instead of his own, but that it was the same party with whom he was acting, and that the contract with Mr. Ord was the fulfillment and satisfaction of all possible rights under the statement or proposal which Mr. Forsyth had executed and delivered to Mr. Weston.

Said plaintiff stated that by reason of the existence of the large encumbrance upon the lands Mrs. Forsyth could not execute the agreement presented, and insisted that if any contract were to be made it should be so drawn as to enable the Forsyths to contest the mortgage without being compelled to remove the same as a condition to the conveyance of the title.

And further pointed out to the manager of the Belt Line Railroad Company the defects in the description of the property in said agreement, which would necessitate its being redrawn, and also discussed with him the uncertainty and danger to the interests of the Forsyths in two of the clauses in the contract for the payment of the deferred payment of two-thirds of a million. The said plaintiff stated to Mr. Weston that the Forsyths were willing to sell the land, but they could make no contract which would be inconsistent with the condition of the title and the actual status of the property; that any agreement which they would make would have to take into view the actual condition of the property, and that under no circumstances would they sign an agreement which they could not fulfill.

In regard to the mortgage incumbance, the said plaintiff proposed to Mr. Weston that a sum in excess of the total amount claimed by the complainants in the foreclosure suit as an indemnity and a security to the purchaser of the land against whatever lien there might be found by the decree of the court to exist against the lands in favor of the holders of the notes (secured by the trust deed
83 to Pierson) should be deposited in the hands of some responsible trust company which should be satisfactory to Mr. Ord, and suggested as the proper company to hold the deposit the Union Trust Company of New York. Mr. Weston expressed himself as satisfied with the suggestion, but recommended the Mercantile Trust Company of New York as the depository, stating that the parties connected with him and Mr. Ord had friendly relations with that institution, and would be better satisfied with it as the custodian of the fund than with the other. The said plaintiff agreed that the plaintiffs would satisfy themselves as to the standing and responsibility of the Mercantile Trust Company, and if it were shown to be

good they would agree that it should be the depository of the fund.

Several days were consumed in interviews with Mr. Weston and Mr. Forsyth, and in the drawing of clauses for a new agreement, during which time Mr. Forsyth brought word to the plaintiffs from his wife that she might desire to reserve a certain tract of land out of the contract embracing about one hundred and twenty acres. The said plaintiff negotiated with Mr. Weston in regard to such reservation. He objected strenuously at first, on the ground that if the Belt Line railroad should build its tracks on the property it might sustain serious inconvenience to encounter a distinct ownership of a tract of land in the heart of their property. The said plaintiff suggested to him that if any portion of the property so reserved should become necessary for railroad purposes it could be taken by condemnation proceedings on the payment of its fair cash value. Upon this showing Mr. Weston agreed to approve of a clause providing for the reservation of about one hundred and twenty acres of land, in case Mrs. Forsyth should elect to retain it from sale.

After the negotiations with Mr. Weston had been commenced the plaintiffs suggested to the Forsyths a question as to whether Milton Weston had the right or authority to make terms in a contract on behalf of Joseph P. Ord, and expressed to the defendants solicitude as to the result which might ensue, in case of the refusal of Mr. Ord to ratify such contract as Mr. Weston might assume to make in his name; and they proposed to Mr. Forsyth that his wife should execute a power of attorney to one of the members of the firm of Doolittle & McKey, and that Mr. Forsyth should accompany said plaintiff to New York for the purpose of negotiating the terms of the contract with Mr. Ord personally. Mr. Forsyth expressed himself impressed with the suggestion, and endeavored to raise money enough to carry it out. In this he was unsuccessful, stating to the plaintiffs that he was unable to raise the necessary money, but said that he had seen Mr. Weston, and that Weston agreed that upon the signing of a contract by Mr. and Mrs. Forsyth, embracing in sub-
84 stance the terms talked about between the plaintiff, J. R. Doolittle, Jr., and himself, he would pay the sum of $10,000 which he had in his hands, and thus, Mr. Forsyth stated, obviate the necessity of negotiations in New York with Mr. Ord.

The plaintiffs thereupon drew up in form an agreement as follows:

PL'FFS' EX. 10.

"Articles of agreement made this tenth day of June, in the year of our Lord one thousand eight hundred and eighty-one, between Jacob Forsyth and Caroline M. Forsyth, his wife, of North Township, county of Lake, and State of Indiana, parties of the first part, and Joseph P. Ord, of the borough of Princeton, county of Mercer, and State of New Jersey, party of second part, witnesseth: That if the party of the second part shall first make the payments and perform the covenants hereinafter mentioned on his part to be made and performed, the parties of the first part, each for himself and herself, hereby covenant and agree to convey and assure to the said

party of the second part within the ninety days next succeeding the execution and delivery of this contract in fee-simple, clear of all incumbrances whatsoever (except in regard to a certain deed of trust hereinafter mentioned), by a good and sufficient warranty deed, the lots, pieces, or parcels of ground, situated in the county of Lake and State of Indiana, known and described as follows:

"The west half of the southwest quarter of section six; the northwest quarter of the northwest quarter and the south half of the northwest quarter and the southwest quarter of the northeast quarter, and lots one, two, three, and fourth, in the south half of section seven; the west half of the southwest quarter of section eight; the northeast fract'l quarter, the east half of the southeast quarter (the east half of the northwest quarter), and the west half of the soutwest quarter of section sixteen; lots one and two, fr'l southwest quarter of section fifteen; the north half (except the southeast quarter of the northwest quarter) and the south half (except the northeast quarter of the southwest quarter) of section seventeen; lots three and four of the southeast fr'l quarter of section eighteen; all of fractional section nineteen; all of section twenty; all of section twenty-one; all of fractional section twenty-two; all of sections twenty-seven, twenty-eight, and twenty-nine; the northeast quarter and the north half of the northwest quarter and the north half of the southeast quarter and the southeast quarter of the southeast quarter of section thirty; all of section thirty-two north of the river (except the west half of the northwest quarter and the northwest quarter of the northeast quarter); the north half and the south half north of the river of section thirty-three; the north half and all of the south half
85 of section thirty-four, north of the river; the west fractional half, including the fraction south of the river, of the southwest quarter of section thirty-five, all in township thirty-seven north, range nine west.

"Also lots two and three and all of lot one, (except five and $\frac{82}{100}$ acres, heretofore conveyed to E. A. and C. B. Shedd, and except the strip of land lying between the right of way of the Pittsburgh, Ft. Wayne and Chicago railroad and of the Lake Shore and Michigan Southern railroad, containing about two acres, hertofore conveyed to John Kreuter,) in the northeast quarter and the southeast fractional quarter of section one; lots one, two, three, and four, in section twelve; lots one and two, in section thirteen; lots two and three and the southeast quarter of the southeast quarter, and the west half of the north half of the southwest quarter of section twenty-four, all in township thirty-seven north, range ten west, containing in all eight thousand acres, more or less:

"Provided, That the portion of said lands described as follows: commencing at a point on the east side of the Indiana boulevard, where the centre line of section twenty intersects the same, running thence east along said centre line to the quarter post on the east line of said section twenty; thence southeasterly in a straight line to the southeast corner of the north half of the northwest quarter of section twenty-eight; thence west on the south line of said north half of said northwest quarter of section twenty-eight to the east

line of said Indiana boulevard; thence northwesterly along the easterly line of said boulevard to the point or place of beginning, containing about one hundred and twenty acres, more or less, may be retained and not conveyed by said parties of the first part, at their option; but in case the parties of the first part elect not to convey said last-described land they hereby agree to convey, upon like terms, in lieu thereof, an equal amount in acres of other lands situate within the limits of said tracts hereby agreed to be conveyed or contiguous thereto, and it is expressly understood and agreed that said election, if made at all, shall be made within sixty days from and after the signing of this contract: And provided, further, That while in said deed of conveyance the said parties of the first part will convey the following-described pieces or parcels of ground before mentioned or included in other descriptions above set forth, to wit: the northeast quarter of the southeast quarter and the southwest quarter of the northeast quarter of section twenty; the southwest quarter of the southwest quarter of section twenty-one; the northwest quarter of the southwest quarter of section twenty-seven; the northwest quarter of the southeast quarter of section twenty-eight; the west fractional half of the southwest quarter and fraction south of river in section thirty-five, all in township thirty seven
86 north, range nine west; and the southeast quarter of the southeast quarter of section twenty-four, and the northwest quarter of the northwest quarter of section thirty, in township thirty-seven north, range ten west, by deed, with full covenants of warranty of title, and will deliver peaceable possession thereof, they do not claim that the record title of the same is perfect and complete in all respects on the record. And it is expressly understood that the said party of the second part shall not object to the said deed or refuse to accept the same on account of defects or imperfections in the record title of the said last-described lands, aggregating about three hundred acres, provided he is satisfied with the sufficiency of the title of the other portions of said lands conveyed by said deed.

"And provided, further, that said conveyance shall be made subject to existing highways and railroad rights of way upon and across various portions of said lands.

"It is mutually understood and agreed by and between the parties hereto that there is at the time of the execution of this contract an incumbrance upon said lots, pieces or parcels of land, made and executed by said parties of the first part in the form of a deed of trust to one John O. Pierson, as trustee, to secure the payment of twenty-eight promissory notes of said parties of the first part, for the aggregate sum of one hundred and sixty-three thousand dollars, all of said notes and said deed of trust bearing date October 1st, A. D. 1875, and all of said notes maturing five years after said date; that said Pierson, as trustee, and Aquila Adams, Axel Dearborn, and Asaph Churchill, claiming to be the legal holders of said notes, are now complainants in a cause now pending in the circuit court of the United States in and for the district of Indiana, against the parties of the first part and other persons, as defendants, seeking the

foreclosure of said trust deed and the sale of the lands covered thereby, to pay and satisfy the amount due upon said notes; that said complainants claim in their said bill of complaint various matters of demand in addition to the debt, which with interest up to this date would make the total amount of their assumed claims, including their actual claim, two hundred thousand five hundred dollars, or very near that sum; that the parties of the first part have answered said bill, and claim that the total amount due and chargeable upon said lands is not more than one hundred and seven thousand eight hundred and sixty-nine and $\frac{37}{100}$ dollars; and the said suit is yet undetermined.

"Now, therefore, it is mutually agreed by and between the parties hereto that when the said sum of three hundred twenty-three thousand three hundred and thirty-three dollars and thirty-three
87 cents shall be paid, as hereinafter provided by this contract, that the sum of two hundred and five thousand dollars, part thereof, instead of being paid directly to said parties of the first part, shall be placed in the hands of the Mercantile Trust Company, as trustee of said fund, as the money of the said parties of the first part, and as a security to the party of the second part against the said deed of trust to said John O. Pierson, and the lien thereof upon the said lands so to be conveyed to the party of the second part, the same to be held by said Mercantile Trust Company of New York, to await the final order and decree of the said court in said cause, and to satisfy, pay, and discharge whatever amount may be by said court decreed as a lien and charge upon any portion of the lands mentioned in this contract; that upon the presentation to said Mercantile Trust Company of a duly authenticated copy of such decree of said court, fixing the amount of the lien or charge upon said lands, under and by reason of said trust deed, it shall be lawful for said Mercantile Trust Company to pay into the registry of said court the amount of said decree and the costs of suit; and to render the overplus of said fund so deposited to the said Caroline M. Forsyth, her legal representatives and assigns: Provided, however, That in case of an appeal from said decree, the said deposit shall not be so used or disturbed, except with the consent in writing of said Caroline M. Forsyth and Jacob Forsyth, first had and obtained.

"It is further mutually agreed that said sum of two hundred and five thousand dollars, so to be deposited with said Mercantile Trust Company, shall be invested by said company in four per cent. bonds of the United States, or in such other bonds as shall be agreed upon by the parties hereto, and that the interest accruing on said bonds, after paying the costs and charges of said company concerning said trust, shall be paid to the parties of the first part, by said company, as it accrues.

"And the said party of the second part hereby covenants and agrees to pay to the said parties of the first part, in consideration of said conveyance, the sum of one million of dollars, in the manner following:

"First. Nothing herein contained is to be construed as an obligation on the part of the party of the second part to pay any sum ex-

ceeding three hundred and thirty-three thousand three hundred and thirty-three dollars and thirty-three cents, within ninety days from the date of this contract, if he elect to complete said purchase, or more than ten thousand dollars, if he elect, as hereinafter provided, not to complete said purchase.

"Second. Ten thousand dollars cash shall be paid by the party of the second part to the parties of the first part, contemporaneously with the execution and delivery of this agreement, the receipt of which payment is hereby acknowledged.

88 "Third. Three hundred and twenty-three thousand three hundred and thirty-three dollars and thirty-three cents, in cash, shall be paid by the party of the second part to the parties of the first part, within ninety days next succeeding the execution and delivery of this agreement, upon delivery to the party of the second part by the parties of the first part of a good and sufficient warranty deed, conveying to the party of the second part, in fee-simple, clear of all incumbrances whatsoever, except as hereinbefore stated, all of the lots, pieces, and parcels of land hereinbefore described. If, at the expiration of said ninety days, the said three hundred and twenty-three thousand three hundred and thirty-three dollars and thirty-three cents shall not have been paid by the party of the second part, a tender of said deed having been theretofore duly made, as herein provided, then and in that event the ten thousand dollars already paid by the party of the second part shall be and become thereby forfeited to the parties of the first part as full satisfaction and in liquidation of all damages sustained by the parties of the first part by reason of such breach of contract, and thereupon and thereby this contract shall become terminated, cancelled, and of no effect.

"Fourth. The residue of the amount due to the parties of the first part, in accordance with the terms of this contract, for the lands hereinbefore described, shall be paid by the party of the second part, at his option, either in cash, in four equal annual instalments, dating from the day of the execution of this contract, with interest upon the amount so remaining unpaid at the rate of six per centum per annum, to be paid semi-annually, to be secured by a first mortgage on the property so conveyed, or, at the option of the party of the second part, the said principal sum so secured may be paid at any time within the said four years.

"It is further mutually agreed by and between the parties hereto that the said residue of the amount due to the parties of the first part in accordance with the terms of this contract may, at the option of the party of the second part, be paid either in cash, as hereinbefore provided, or in twenty-years first mortgage bonds, at par, of the East Chicago Improvement Company, to be hereafter organized by the party of the second part and his associates or assigns, which bonds shall be secured by a mortgage on the lands conveyed hereunder, shall draw not less than six per centum per annum interest, payable semi-annually, and shall not exceed in amount the residue of the amount due to the parties of the first part, to wit: six hundred and sixty-six thousand six hundred and sixty-six dollars and sixty-seven

cents, and interest thereon, at the rate of six per centum per annum, from the date of the execution of this contract until the delivery of said deed of conveyance to the party of the second part by the parties of the first part, the payment of which bonds shall be guaranteed by the Chicago Belt Line Railroad Company.

89 "Fifth. It is further mutually agreed by and between the parties hereto that, before making any payments hereby agreed to be made by the party of the second part, except the first payment of ten thousand dollars, he shall be satisfied that the conveyance hereby contracted to be made to him will convey to him a good and sufficient title to the lands so conveyed and hereinbefore described (with the exception before stated) in fee-simple, and free from encumbrances of any sort, except as to the said trust deed to John O. Pierson, which is to be paid and discharged by the parties of the first part in the manner hereinbefore set forth, or in some other mode acceptable to the parties of the first part, without cost to the party of the second part.

"And it is further agreed by the parties hereto that the party of the second part shall satisfy himself as to the sufficiency of the title to be conveyed as aforesaid within ninety days from the date of the execution of this contract, and he shall have no right either to demand a conveyance of said lands or to reject said title for insufficiency after the expiration of said ninety days.

"In witness whereof the said parties to these presents have hereunto set their hands and seals the day and year first herein written.

"JACOB FORSYTH. [SEAL.]
"CAROLINE M. FORSYTH. [SEAL.]

"Signed, sealed, and delivered in the presence of—
"J. R. DOOLITTLE, JR.,
"As to JACOB FORSYTH AND
"CAROLINE M. FORSYTH."

On the 10th of June, 1881, Mr. and Mrs. Forsyth came to the office of the plaintiffs; the said contract drawn by them was carefully examined, read over, and discussed by Mr. and Mrs. Forsyth, and was executed by them in the presence of one of the said plaintiffs. The contract so executed was delivered by Mr. Forsyth on the same day to the manager of the said Belt Line railroad, Mr. Weston, and the sum of $10,000 was paid down at the time of such delivery.

(Said contract will hereafter be styled the contract of June 10.)

Before the execution of said contract of June 10th by Mrs. Forsyth, one of the plaintiffs, J. R. Doolittle, Jr., examined the same carefully with her, and explained its provisions, and stated to her that the terms of the instrument enabled her and her husband to make a sale of the property without paying and discharging the mortgage encumbrance to Pierson resting upon the lands; and that they were enabled by its terms to litigate the amount due upon the mortgage, and were relieved from the necessity of paying it on passing the title. Said plaintiff explained to her that if they had been required, in order to give a

90 good title to the property, to remove that mortgage from the

records, they would have been placed in a position where the holders of the notes could not only have exacted from them the face of the notes, but could have demanded the sum of $4,650, described as attorney's fees in the notes, and the further sum of ten per cent. upon whatever amount might be found due in the suit to foreclose the mortgage, as a solicitor's fee, provided for in the deed of trust to Pierson; that the amount which was claimed for a solicitor's fee would not be less than $17,000, and that while those items, the attorney's fee and the solicitor's fee, might or might not have been collectible in law they have been made the basis of a demand by the complainants in the foreclosure suit; and, if the Forsyths should be obliged to settle the suit, they would undoubtedly be demanded by the complainants in the settlement, but that preparations were made in the agreement which would enable the Forsyths to litigate the said foreclosure suit for an unlimited period of years without interfering with the sale of their estate.

In regard to the provision for the security for the deferred payment of two-thirds of a million and interest said plaintiffs explained to her that it was carefully protected and guarded; that the bonds which the East Chicago Improvement Company could issue and secure, by a first mortgage upon the lands to be conveyed by her to Mr. Ord, could not exceed the deferred payment due to her for the purchase-money; that the security for the deferred payment was limited upon the identical property to be sold, and that the terms of the instrument avoided all of the objections contained in a similar provision contained in the draft of the .contract presented by Mr. Forsyth to the plaintiffs and rejected by them; avoided all uncertainty about the value of the lands securing the bonds; avoided all question about the real value of other lands which might be included in the mortgage executed by the East Chicago Improvement Company, and expressly avoided the provision in the draft of the contract, presented and rejected, under which Mr. Ord had the right to pay the deferred payment of two-thirds of a million in bonds of the company, secured upon lands wholly distinct from those to be conveyed by Mr. and Mrs. Forsyth, and especially avoided the measure suggested in the rejected contract for the payment of two-thirds of the purchase-money by a reconveyance of an undivided two-thirds interest in the lands; that the agreement provided for the investment of the money deposited with the Mercantile Trust Company in safe security, and would thus enable her, in case of a protracted litigation, to receive interest upon the sum so deposited; and, that while the contract enabled the Mercantile Trust Company to pay and discharge whatever decree the court might render in the case, that could only be done with the consent of the Forsyths. If the decree rendered by the court should be satisfactory to them and unsatisfactory to the complainants, and the complain-
91 ants should take an appeal, the money could not be paid into the registery of the court by the trust company without the consent of the Forsyths, thus enabling them, in case of an appeal by the adverse party, to draw interest upon the fund while the appeal was pending; and that, in case the decree entered by the

court should be unsatisfactory to the Forsyths, and they should desire to appeal, the decree should not be paid by the Mercantile Trust Company, unless the Forsyths saw fit to have it so paid; that the contract enabled the Forsyths to declare a forfeiture of the $10,000 payment in case of the non-completion of the purchase, for under it they could make a tender of a deed conveying a good title, except as to certain excepted portions, the title of which was understood by the agreement not to be perfect of record, and excepting the mortgage encumbrance on the land; that this clause made the contract worth to Mrs. Forsyth at the time it was executed the sum of $10,000, in case the title to the lands was good with the exceptions stated in the contract; that while the contract was actually worth only that sum as a consideration for keeping the lands out of the market for ninety days, it might lead to a sale of the lands.

And said plaintiff remarked to Mrs. Forsyth that the payment of ten thousand dollars for ninety-day option was a good indication of the ability of Mr. Ord and his associates to complete the purchase of the lands if they should desire to do so.

In regard to the time limited for the approval of the title said plaintiff stated to Mr. and Mrs. Forsyth that the provision on that point in the contract had for its object to compel prompt action on the part of the intended purchaser and to cut off, by express agreement, every possible right on the part of Mr. Ord, or claim to a right, under the contract, after the period of ninety days should expire.

On the 7th day of July, 1881, Mr. E. G. Mason, of the firm of E. G. & A. B. Mason, attorneys-at-law, having an office in the city of Chicago, State of Illinois, called on the plaintiffs and stated that they had been retained as attorneys for Mr. Joseph P. Ord in the matter of the Forsyth sale, and asked for the abstracts of title to the property. The plaintiffs called his attention to the fact that in the contract of June 10, executed by Mr. and Mrs. Forsyth, there was no provision calling for the furnishing of abstracts of titles to Mr. Ord, but stated that they had no doubt Mr. Forsyth would be willing to give the use of such abstracts as he had to the attorneys of Mr. Ord to aid them in examining the title.

On the 11th of July Mr. Forsyth notified the plaintiffs that Mr. Joseph P. Ord was in Chicago, and desired a conference on the subject of the contract. On the afternoon of that day one of
92 said plaintiffs, J. R. Doolittle, Jr., called at the office of the Chicago Belt Line Railroad Company and met Mr. Ord and Mr. Alfred Bishop Mason, one of the firm of E. G. & A. B. Mason.

Mr. Ord stated that instead of the contract which had been signed June 10 he wanted the contract which he had sent to Chicago by Mr. Weston signed; that it had been prepared in the office of Alexander & Green in New York, and they knew just what agreement they wanted to make.

Said plaintiff stated to Mr. Ord that the Forsyths had signed a contract and delivered it to Mr. Weston, the manager of the Belt

Line, and had received $10,000 from him, and that they could not execute the agreement, sent from New York, because it was wholly inapplicable to the status of the title.

Said plaintiff spent some time at said interview in going over the contract of June 10 in the effort to explain to Mr. Ord and his counsel that its provisions were fair and reasonable, and ought not to be objected to by him or his associates.

Mr. A. B. Mason directed his objections especially to the provision in the contract limiting the amount of bonds which the improvement company could issue and secure by mortgage on the lands, and to the fact that the agreement provided for a first lien upon the lands, limited to the amount of the deferred payment. Mr. Mason and Mr. Ord claimed that such limitation would be fatal to the success of the improvement company, because if the land were to be bonded it would undoubtedly be for a much larger sum than two-thirds of a million dollars, and the bonds (to be issued) must be secured by a first mortgage on the lands, otherwise they could not be sold on the market.

Said plaintiff stated to Mr. Ord and his counsel that the Forsyths would modify the agreement in any way which would facilitate the advancement of the interests of the company, and, at the same time, protect the security of Mrs. Forsyth, and suggested as an expedient which might meet the necessities of the case that the improvement company should issue as many bonds as it saw fit, secured by mortgage on the lands conveyed, and on such other lands as might be embraced in the mortgage, place them in the hands of a trust company for sale, and devote the proceeds of one-half of the bonds to the payment of the unpaid residue due Mrs Forsyth until it should be fully paid with the interest, the debt to Mrs. Forsyth to be guaranteed by the said Belt Line Company, and that if this idea could be properly formulated said plaintiff suggested that the mortgage to Mrs. Forsyth to secure the deferred payment might be waived.

Mr. Mason and said plaintiff tried to put the measure in form, but separated without formulating anything definite, and agreed on another meeting on the subject for Saturday, July 16, and in
93 the meantime it was understood that Mr. Mason should draft a provision and submit it to the said plaintiff for his examination.

In the interview the said plaintiff insisted that Joseph P. Ord should accept the said contract of June 10, and that, if any modifications were made, it should be done by modifying that agreement in express terms; but said Ord and his counsel did not agree to accept the contract of June 10.

Said plaintiff, in said interview of July 11 with Mr. Ord and Mr. Mason, had suggested for their consideration another mode, to wit, that ths mortgage to be made by the improvement company should be made subject to the mortgage to Mrs. Forsyth, and should be so drawn as to require the trustees to apply the first money received on the sale of the bonds to the payment and discharge of the mortgage to Mrs. Forsyth. This suggestion was rejected by Mr. Ord on

the ground that, in order to sell the bonds of the improvement company, it would be necessary to have title free and clear.

Said plaintiff stated to Mr. Forsyth that the measure for the purpose of transferring the security for the deferred payment from the land to the bonds of the improvement company, to be secured on the land, was extraordinary and unusual, and that he had suggested the same only because he feared, from the position assumed by Mr. Ord and his counsel, that the contract would be abandoned unless some expedient could be devised which would meet their views about the sale of the bonds of the improvement company. Said plaintiff also stated to Mr. Forsyth that the status of the negotiations was extremely delicate, for the Forsyths could not safely concede all the modifications which were demanded by Ord; that Mr. Ord had not accepted the contract of June 10th, nor did he agree to accept it unless it should be modified in a manner satisfactory to himself; that the Forsyths could not sign the contract which Mr. Ord had sent to Weston, and which the plaintiffs had rejected, because they would not not be able to fulfill its terms, and stated to Mr. Forsyth that there was danger that Mr. Ord would repudiate the contract of June 10th, and demand the return of the $10,000 paid at the time it was delivered to Mr. Weston, on the ground that Mr. Weston had no authority to pay the money on the delivery of any such contract as the contract of June 10th, and advised the Forsyths that the policy to be pursued in the negotiations should be as follows:

First. To insist upon and secure the acceptance of the contract of June 10th by Mr. Ord, which would amount to the ratification of the action of Mr. Weston in paying the $10,000 upon the delivery of that contract, and thus avoid the danger of a suit to recover back the money, on the ground that it had been paid without authority.

94 Second. To make any and all modifications in the contract of June 10th possible to be made, to meet the views and wishes of Mr. Ord, and thus, if successfully formulated, reach a mutual agreement binding upon both parties to it.

On the 12th of July the counsel for Mr. Ord presented to the plaintiffs a draft of a modification in the agreement, as follows:

PL'FFS' EX. 35.

"This indenture, made at the city of Chicago, in the county of Cook and State of Illinois, this — day of July, A. D. 1881, by and between Caroline M. Forsyth and Jacob Forsyth, of North Township, county of Lake, and State of Indiana, parties of the first part, and Joseph P. Ord, of the borough of Princeton, in the county of Mercer and State of New Jersey, party of the second part, witnesseth:

"1. That this agreement is supplemental to and explanatory of the certain articles of agreement, dated June 10, A. D. 1881, by and between the parties hereto.

"2. That for good and valuable considerations, moving from said second party to said first party, the receipt whereof is hereby

acknowledged by said first party, said first party agrees that said second party may have a further option as follows, as to the payment of the $666,666.67, which will be due said first parties after the payment of $333,333.33, provided said second party elects to carry out the purchase set forth in said articles of June 10, A. D. 1881. In case said second party or his associates or assigns organize the East Chicago Improvement Company or some similar organization, the said company may issue twenty-year first-mortgage bonds bearing six per cent. semi-annual interest to any amount upon the security of the lands in said articles of June 10, A. D. 1881, described, or of such lands and such other lands as may be mortgaged to secure said bonds; that a number of said bonds, not less than $700,000 par value, which number shall bear the same proportion to the whole number of such bonds as the value of one-half of the lands described in the articles of June 10, A. D. 1881, bears to the value of all the land mortgaged to secure said issue of bonds, shall be deposited with the Mercantile Trust Company of New York city, to be sold by said trust company: that said trust company shall pay the proceeds of such sales to said parties of the first part, until said first party shall have received the sum of $666,666.67 with interest at six per cent. per annum, from June 10, A. D. 1881; that the balance of the proceeds of said bonds so deposited, or the bonds remaining unsold after said payment has been completed, shall be delivered by said trust company to said improvement company upon demand.

95 "In witness whereof the said parties to these presents have hereunto set their hands and seals, the day and year first above written.

"_____ _____. [SEAL.]
"_____ _____. [SEAL.]
"_____ _____. [SEAL.]

"Signed, sealed, and delivered in the presence of—
"_____ _____."

One of said plaintiffs, J. R. Doolittle, Jr., in discussing this proposed modification with Mr. Forsyth, stated that one ground of objection to it was the provision that the bonds deposited as a security for the debt of two-thirds of a million should bear the same proportion to the whole number of such bonds as the value of one-half of the lands described in the contract of June 10 should bear to the value of all the land mortgaged to secure said issue of bonds; that it provided for the ascertainment, in the future, of the relative value of the lands to be conveyed by Mrs. Forsyth, and other lands which might be included in the mortgage made by the improvement company; and that the adoption of such a measure would at once create imminent danger of a dispute and litigation, when the time should arrive for the ascertainment of the relative value of such lands; that the proposed agreement was also objectionable for another reason, that it made no provision for the course which might be pursued by Mrs. Forsyth in case the bonds were not sold; that no time was fixed within which they should be sold, and no provision was made as to the mode in which she could proceed to enforce her lien; and

that the agreement contemplated the appointment of the Mercantile Trust Company, of New York city, as trustee, but contained no clause requiring the acceptance of such trust by the Mercantile Trust Company, and was objectionable also upon this ground.

On the 14th of July said plaintiff commenced the drawing of a new agreement, correcting, modifying, and enlarging upon the proposal presented by the counsel of Mr. Ord.

On the 15th of July said plaintiff had a long consultation with the counsel of Mr. Ord upon the subject of the proposed contract, and at the interview raised the question as to the validity of the proposed guaranty of the debt of Mr. Ord by the Chicago Belt Line Railroad Company, and urged that the question was one of considerable importance to the Forsyths, for they relied upon the guaranty of the Belt Line road as an element of security for the deferred payment; and it was because of such reliance that the proposition was originally made, that one-half of the bonds issued by the improvement company should be pledged as a security for the deferred payment to Mrs. Forsyth.

The counsel of Mr. Ord expressed great solicitude for the early completion of the negotiations, and he left the said plaintiff
96 with the understanding that the subject should receive his immediate and urgent attention. The said plaintiff gave the question of the power of a corporation to assume the debt of another corporation or person early attention, and satisfied himself that such a contract was beyond the corporate powers of a coporation, and could not be enforced at law.

On the 16th of July said plaintiff notified the counsel of Mr. Ord of the conclusion reached upon that point, and that the proposed guaranty of the Belt Line road would be wholly disregarded as an element in the negotiations, and wrote a letter to Mr. Forsyth, in substance informing him of the examination of the question and the conclusion reached, and suggesting, as a substitute for the pending proposition, and in order to avoid the obstacle suggested by Mr. Ord, of preventing the sale of the bonds, that the purchaser should pay one-third of a million in cash, execute a mortgage to secure bonds in any amount desired, but not less than a million dollars, deposit all of the bonds in trust with the trust company for sale; and, as the bonds are sold, apply two-thirds of the receipts to the payment of the $666,666.67, until fully paid, with the interest, and allowing the company to receive the other third as it should come in from the sale of the bonds. The letter requested him to confer with his wife upon the subject, and stated that said plaintiff would not approve of the pending proposition.

On the 19th of July the said plaintiff called on Mr. Mason and discussed the new proposition contained in his letter to Mr. Forsyth of the 16th of July.

On the 20th of July the counsel of Mr. Ord called at the office of the plaintiffs and left a note in writing addressed to said plaintiff, asking for a formulated statement of his objections to the form of the Forsyth contract, as drawn in New York and sent here, and also his proposed supplemental contract, and then proceeding as follows:

Pl'ffs' Ex. 37.

"If we are to take this land we must come to a conclusion at once. Your proposition of yesterday, with its two-thirds made one-half, and the Ord mortgage stricken out, seems not unreasonable, but it is of the first importance to have the proposal and the objections to the form we proposed formulated, so that we can know exactly where we stand. Will you kindly let me have this written statement to-day, and will you also get the Forsyth abstract, which was to have been ready several days ago? Pardon my hurrying you, but haste is necessary.

"Yours respectfully,

"Alfred Bishop Mason."

97 To this letter the said plaintiff replied on July 20, 1881, among other things, stating as follows:

"The only contract which Mr. and Mrs. Forsyth have made is the one they have signed, in regard to which I understand that Mr. Ord desires a modification in one particular only, or, rather, a provision supplying an additional mode in which the deferred payment of the two-thirds of a million can be made; and it is proper to say that the new provision was neither mentioned in the contract signed by them nor contemplated in the proposed agreement which came from New York.

"In the contract signed by Mr. and Mrs. Forsyth no agreement was made to furnish an abstract of the property for examination. But that we are ready to do when Mr. Ord signs a duplicate of our contract. We have no supplemental contract to propose. We ask no modification, but are willing to make such a modification as to the deferred payment of the two-thirds of a million as will furnish an equivalent for the existing provisions in that respect; but, in view of the uncertainty as to the validity of the guaranty of such debt by the Belt Line road, I cannot recommend a reduction of the security to one-half of the bonds."

The same day after this letter was sent to Mr. Mason the said plaintiff called on Mr. Mason and had a long interview with him in regard to the subject-matter.

On the 21st of July an interview was had with Mr. Ord, Mr. Mason, Mr. Forsyth, and the said plaintiff. At this interview Mr. Ord stated that he would not make himself personally liable for the payment of the deferred payment to Mrs. Forsyth; and the said plaintiff, in reply, stated that, inasmuch as his clients relied mainly upon the land for security, he thought they would be willing to accept a mortgage upon the lands and waive any personal obligation on the part of Mr. Ord.

The said plaintiff also raised a question as to the power of a corporation to acquire eight thousand acres of land in the State of Indiana. To this inquiry the counsel of Mr. Ord responded that the power certainly existed, and that he had no doubt a corporation could be formed which could acquire the title to such a tract of land. The said plaintiff suggested that the matter was one of great

importance to his clients, for the reason that if the corporation should not have the power to acquire the title it would probably not have the power to execute a mortgage to secure its bonds, and stated to Mr. Mason that any measure based upon securing the deferred payment due to Mrs. Forsyth upon bonds of a corporation must be predicated upon the right and power of the corporation to issue the bonds and to secure them by a valid mortgage upon the lands.

98 Two propositions, expressive of the measures which had been discussed at the interview, and embracing modifications of the contract of June 10th, which the said plaintiff was willing to concede, were then drawn up as follows:

PL'FFS' EX. 6.

"As a supplemental clause in the contract of June 10th I am convinced that Mr. and Mrs. Forsyth would agree that Joseph P. Ord shall execute a mortgage for two-thirds of a million and interest on the lands conveyed to him without a bond, note, or personal obligation of said Ord to pay the sum, thus making the security upon the lands the sole fund for the payment of the debt and all costs of the foreclosure; this provision to be inserted in the mortgage. Said mortgage shall be payable in four equal annual installments, with interest at the rate of six per centum per annum, payable semi-annually, principal and interest payable at the Mercantile Trust Company in the city of New York. It is hereby expressly understood that the whole or any part of the indebtedness secured by said mortgage may be paid at any time at the option of the mortgagor before maturity with accrued interest. In case of failure in the payment of interest, or any part thereof, when due, or of any installment of said indebtedness, thereupon the whole sum remaining unpaid shall become due and payable forthwith without notice of election, and said mortgagee may forthwith foreclose said mortgage.

"Supplemental clause submitted July 21st, 1881.

"J. R. DOOLITTLE, JR."

The other proposition was as follows:

PL'FFS' EX. 7.

"1. A corporation to be organized which has legal power to take title to the lands in question and to issue bonds to any amount secured by first mortgage.

"2. The whole issue of bonds to be not less than $1,500,000, and to be all deposited with the Mercantile Trust Company of New York, which is to sell them at not less than 75 cents on the $1.00.

"3. Two-thirds the gross proceeds to be paid Mrs. Forsyth, balance to the corporation, subject to the costs and expenses of trustee; when Mrs. Forsyth has received $666,666.67, with interest at six per cent. per annum from June 10, 1881, balance of bonds to be del'd to corporation.

"4. If the $666,666.67 and interest not paid by September 10, 1882, Mercantile Trust Company to hold all unsold bonds as security for the balance of the $666,666.67 and interest unpaid.

"Supplemental clause submitted July 21, 1881.

"J. R. DOOLITTLE, JR."

Mr. Ord and Mr. Mason expressed themselves well pleased with these measures, but did not indicate their acceptance of the same.

99 The said plaintiff agreed to draw, in formal shape, an agreement ready for execution, embracing the measures proposed.

Mr. Ord stated that he would send to New York for Mr. Simpson, an attorney-at-law, and associated with the firm of Alexander & Green, a firm of attorneys in the city of New York, and stated that Mr. Simpson would arrange the terms of the contract. The said plaintiff subsequently formulated the proposed agreement to be submitted to Mr. Simpson upon his arrival.

On the 28th of July he had a long interview with Mr. Simpson upon the proposed agreement. Mr. Simpson asked that the contract drawn in New York should be executed by the Forsyths instead of the contract of June 10.

After spending two hours with Mr. Simpson he left him with the understanding that Mr. Simpson should examine all of the contracts proposed and executed carefully, and report the next morning. The following instrument was drawn by said attorney and considered by and left with Mr. Simpson as the modification of the contract of June 10th, 1881, which said attorney would recommend the Forsyths to execute.

PL'FFS' EX. 14.

"This indenture, made at the city of Chicago, in the county of Cook and State of Illinois, this —— day of July, A. D. 1881, by and between Caroline M. Forsyth and Jacob Forsyth, her husband, of North township, county of Lake, and State of Indiana, parties of the first part, and Joseph P. Ord, of the borough of Princeton, in the county of Mercer and State of New Jersey, party of the second part, witnesseth:

"1. That this agreement is supplemental to the certain articles of agreement dated June 10, 1881, by and between the parties hereto, and is made a part thereof, with the same effect as though it had been included in said original agreement.

"2. That for good and valuable considerations moving from said party of the second part to the parties of the first part, the receipt whereof is hereby acknowledged by the parties of the first part, the parties of the first part agree that the party of the second part may have a further option as to the payment and securing of the said deferred payment of the said sum of $666,666.67, which will or may be due said first parties after the payment of said sum of $333,333.33, as provided by said articles of June 10, A. D. 1881, as follows: The party of the second part, simultaneously with the delivery of the deed from the parties of the first part, shall execute a mortgage upon

the lands conveyed to secure the payment of the said deferred payment of $666,666.67, in four equal annual payments, payable in one, two, three, and four years from September 10, A. D. 1881, with
100 interest upon the same from June 10, 1881, payable semi-annually at the rate of six per centum per annum until all of said indebtedness shall be paid, principal and interest payable at the office of the Mercantile Trust company, in the city of New York.

"No note, bond, or other personal obligation in writing of the party of the second part shall be given to the parties of the first part, but the land mortgaged shall be treated as the sole fund for the payment of the said indebtedness and the interest thereon, and the costs and expenses of a foreclosure of said mortgage.

"Said mortgage shall contain a provision that the said indebtedness or any portion thereof may be paid, at the option of the mortgagor or his assigns, at any time before the maturity thereof. And it shall provide that in case of the failure in the payment of the interest upon said indebtedness, or any part thereof, or in case of the failure in the payment of any one or more or either of said annual payments of the principal, or any part thereof, when the same shall mature, according to the terms of said mortgage, thereupon the whole amount of said indebtedness remaining unpaid and the interest shall immediately become due and payable, with the interest, and the said mortgagee or her assigns may proceed to foreclose said mortgage for the whole amount of said indebtedness remaining unpaid, and the interest. And the principal of said indebtedness, or so much thereof as is unpaid, shall, after such default or after maturity, draw interest at the rate of six per centum per annum until the same shall be paid in full.

"And it is likewise agreed by and between the parties hereto that a still further option shall be accorded to the party of the second part in regard to the mode of paying and securing said deferred payment of $666,666.67, as follows:

"In case the party of the second part and his associates shall incorporate a company or become the owners of the capital stock of a corporation already incorporated, which corporation, in the opinion of the counsel of the parties of the first part, has lawful authority to take by deed of conveyance the title in fee-simple to said lands, and to execute a lawful and binding mortgage thereof to secure the amount of bonds hereinafter named, the said corporation may execute a mortgage upon said lands and such other lands as may be mortgaged to secure said bonds, and issue twenty-year first-mortgage bonds, bearing six per cent. semi-annual interest, payable semi-annually in an amount not less than one million and a half of dollars, par value, said mortgage containing a provision that upon default in payment of the interest on said bonds, or any part thereof, the principal of all of the bonds shall become due and payable.
101 "All of said bonds secured by said mortgage shall be issued and delivered to the Mercantile Trust Company of New York as a security for the payment to Caroline M. Forsyth, or her assigns, of said sum of $666,666.67, and interest thereon from the

10th day of June, A. D. 1881, payable semi-annually in the manner following:

"It is further provided that said Mercantile Trust Company shall have the right to sell said bonds or any part thereof at not less than seventy-five per cent. of the par value of each bond sold, and shall deliver the bonds so sold to the purchaser or purchasers, and shall receive from the purchasers the price paid therefor. Two-thirds of the gross proceeds of the sale of each bond sold shall be paid at once by said Mercantile Trust Company to said Caroline M. Forsyth until she shall have received the full sum of $666,666.67, and interest thereon at the rate of six per centum per annum from June 10, A. D. 1881, payable semi-annually. One-third of the proceeds of such sales of said bonds shall be paid to the said corporation issuing said bonds, but the said Mercantile Trust Company shall have no claim for commissions or other costs and charges incurred or made in the execution of said trust or arising from its services in regard to the sale of said bonds, or the receipt and payment of the proceeds thereof, against the said Caroline M. Forsyth or her assigns, nor shall it have or claim as against her or her assigns any lien upon said bonds, or any portion thereof, or the proceeds of such sales. Whatever is paid to said Mercantile Trust Company for its services to be rendered in this behalf shall be paid by the party of the second part or by the corporation issuing said bonds.

"After the payment of said indebtedness to Caroline M. Forsyth has been fully completed all of the bonds remaining unsold shall be held by said Mercantile Trust Company subject to the orders of the corporation issuing the same.

"But in case the said indebtedness to Caroline M. Forsyth, principal and interest as aforesaid, shall not be fully paid on or before the 10th day of September, A. D. 1882, then the whole sum remaining unpaid shall thereupon be due and payable on said date without grace. And from and after said 10th day of September, A. D. 1882, the said Mercantile Trust Company shall not sell any of said bonds remaining unsold at that date, but shall hold the same and the whole thereof as a security for the payment of the amount of the indebtedness to Caroline M. Forsyth then remaining unpaid, and the accrued interest, and the interest to accrue thereon, at the rate of six per centum per annum, and for no other purpose.

"And the said Caroline M. Forsyth or her assigns may thereupon proceed to foreclose and enforce said lien upon said bonds in any court having jurisdiction, and the same may be sold by and
102 under the order of said court for whatever price they will bring to satisfy the judgment or decree which may be rendered by said court, including the costs of suit.

"And the said Mercantile Trust Company shall from time to time furnish to said Caroline M. Forsyth, or her assigns, a full and detailed statement of the number and amount of bonds sold, and the price received for each one of said bonds, upon request.

"Upon the deposit of said amount of bonds, or whatever larger amount may be issued by said corporation, with the Mercantile Trust Company of New York, for the purposes aforesaid, and upon

its acceptance in writing of the duties and trusts imposed upon it by these articles, the parties of the first part will forthwith, by a good and sufficient instrument, release and discharge the said lands from all claim, lien, mortgage, or demand held by them, or either of them, for the payment or security of the said sum of $666,666.67, and the interest as aforesaid.

"In witness whereof the parties hereto have hereunto set their hands and seals, the day and year first above written.

"_____ _____. [SEAL.]
"_____ _____. [SEAL.]
"_____ _____. [SEAL.]

"Signed, sealed, and delivered in the presence of—
"_____ _____."

The plaintiffs advised the defendants that, by the provisions of said proposed contract, the removal of the lien (for two-thirds of a million dollars) upon the lands, the discharge of the mortgage, and the substitution of a lien upon the bonds of an improvement company to be thereafter incorporated, was made conditional upon the future approval, by the counsel of Mr. and Mrs. Forsyth, of the power of such corporation to acquire the title to the lands, and execute a valid mortgage upon the same to secure said bonds; and that, in case the counsel of the Forsyths should not approve the validity of such mortgage to be executed by said company, a change of the security from the lands to the bonds would not have to be made; and advised that, in case of the approval of the validity of such mortgage, the contract limited the right to sell such bonds to the trust company, in whose hands the bonds should be deposited, thus avoiding all danger of complication or dispute between the Forsyths and the improvement company, in the sale of the bonds and in the application of the proceeds of such sales; and advised that the agreement limited the price at which the bonds could be sold to seventy-five per cent. upon the par value, and fixed the amount of the bonds at not less than one million and a half dollars; and that, in case the bonds should be sold at the minimum price fixed, they would produce not less than $1,125,000,
two-thirds of which ($750,000) would more than pay the
103 two-thirds of a million remaining payable to Mrs. Forsyth;
that the agreement allowed one year from the 10th day of September, 1881, within which the trust company could sell the bonds; and if at the expiration of that time the amount due Mrs. Forsyth had not been fully paid, the trust company was prohibited from selling any more of the bonds at any price, but was required to hold the entire amount remaining undisposed of as a security for whatever might then be due Mrs. Forsyth; and it provided that she could proceed at once to foreclose her lien for the amount then due in any court having jurisdiction, and sell the bonds under the order of the court for whatever price they might bring, to satisfy such decree as she might obtain; and that if at the expiration of the period (September 10, 1882) none of the bonds had been sold, she could, under the decree obtained by her, sell the entire issue of bonds, and

if there were no bidders she could buy them herself; if there were bidders, she could bid an amount sufficient to pay her decree; and that if one-third of the bonds should have been sold (by September 10, 1882, at the minimum price) she would have received $250,000, and would hold a lien for $416,666.67, and the interest on two-thirds of a million from the 10th day of June, 1881 (less the proper rebate on sums received), secured upon one million bonds, which, under the decree (she might obtain), she could either sell for the amount due her, or become the purchaser of herself; and stated that if Mrs. Forsyth should become the purchaser of such bonds, under such decree, she could, at once, foreclose the mortgage given by the improvement company to secure the same, in case the interest were not paid. One of the plaintiffs, J. R. Doolittle, Jr., advised the defendants that, while the plaintiffs did not approve of the making of such a contract, on account of the extraordinary, complicated, and difficult provisions which it contained, they would advise the defendants to execute the same, in order to secure the consummation of a contract with Mr. Ord, and to save the chance of making a sale of the lands.

Information was brought to the attorneys of the Forsyths, on or about the 28th of July, 1881, that Hon. Wm. H. Barnum, of Connecticut, was in the city; and, as they had previously been told that Mr. Barnum was, in some way, identified with the proposed purchase by Mr. Ord, of the Forsyth estate, Mr. J. R. Doolittle, one of said plaintiffs, who, for many years, had been acquainted with and on friendly terms with Mr. Barnum, concluded to call upon him and consult with him concerning the projected enterprise of the sale. He called at Mr. Barnum's hotel and had a consultation with him in regard to the project. On returning to the office of said firm, he stated to his partner, Mr. Doolittle, and to Mr. Forsyth, that Mr. Barnum considered the price of the land, one million dollars, as very high,
104 and that, at the time, he was not interested in the project of the purchase of the Forsyth estate, but might, or might not, become so afterwards.

On the 29th of July Mr. Simpson called at the office of the plaintiffs, and requested them to make an appointment to confer with Mr. Barnum in regard to the terms of the contract. An appointment was agreed upon for the afternoon of the same day, to take place at the office of the plaintiffs. One of the members of said firm, J. R. Doolittle, Jr., informed Mr. Forsyth of the hour fixed for the conference with Mr. Barnum. Mr. Forsyth stated that he thought he knew what Mr. Barnum intended to accomplish in the negotiations; that he would propose to cut the price of the land down $250,000, and buy it at that figure, and Mr. Forsyth stated that the price must be held up to a million, if it were possible to do so. Said plaintiff suggested to Mr. Forsyth that he should procure at once a map of the property in question and adjoining property, and should mark down upon the adjoining property the prices at which it was held by the owners, so that if Mr. Barnum should propose a reduction in the price, the plaintiffs could show to him, by comparison, the prices of the adjoining lands.

The interview with Mr. Barnum occurred at the time appointed, on the 29th day of July. The conference as to the terms of the agreement occurred between him and the plaintiffs, J. R. Doolittle and J. R. Doolittle, Jr. Mr. Barnum suggested that Mr. Ord and his associates needed a longer time than that provided in the contract of June 10th within which to complete their arrangements, and suggested an extension of sixty days. Mr. Doolittle, Jr., stated that an extension of the contract was a new measure, which could not be agreed upon without the authority of the Forsyths, and he stepped into another room and laid the matter before Mr. Forsyth, who said he was greatly relieved that the proposition of Mr. Barnum was for an extension instead of a reduction in the price of the property, and stated that of course it would have to be agreed to.

Said plaintiff then said to Mr. Forsyth that perhaps Mr. Barnum would agree to the payment of an amount of money for the privilege of an extension. To this suggestion Mr. Forsyth responded with a request that said plaintiff should endeavor, if possible, to get another $10,000. Said plaintiff returned to Mr. Barnum and presented the matter to him. He objected strenuously at first to the payment of anything, but finally, after much discussion, stated that he would agree to the payment of interest at the rate of six per cent. per annum upon the sum of $990,000 from the 10th day of September, 1881, up to such time within the period of sixty days from that date as said Ord should elect, either to complete, or not to complete, the purchase of said lands, the amount so paid, in case the contract to
105 purchase were abandoned, to be treated as the consideration for the extension of the option, and in case of the completion of the purchase, so much thereof as should equal the interest on the deferred payment of two-thirds of a million, during the continuance of the extension of the option, should be applied as interest on such deferred payment.

It was further agreed between Mr. Barnum and said plaintiffs that the contract of June 10th should be accepted by Mr. Ord, and that the measure looking to the deposit of the bonds of the improvement company as a security for the payment of the deferred payment of two-thirds of a million to Mrs. Forsyth should be wholly swept away, and that, instead of that measure, Mrs. Forsyth should receive a mortgage upon the lands to be conveyed by her for the amount of the deferred payment, but that the payment, instead of being made in four equal installments, as specified in the contract of June 10th, should be made in seven annual installments, beginning with the first day of January, 1883; six for the sum of $100,000 each, and the last for the sum of $66,666.67, with semi-annual interest, payable on the first day of January and July, in each and every year, until the full payment of the indebtedness.

After the terms of the agreement had been fixed upon between Mr. Barnum and said plaintiffs, Mr. Simpson and Mr. Doolittle, Jr., were requested by Mr. Barnum to draw the agreement in form.

The conference lasted two hours and the parties separated, Mr. Simpson agreeing to return the same day to the office of the plaintiffs, and work with them in drawing the agreement.

After Mr. Barnum and Mr. Simpson had left the office, Mr. Forsyth stated to Mr. Doolittle, Jr., that he would like to have the agreement so worded as to provide for the absolute payment of the interest on $990,000 for the full period of the extension. Said plaintiff stated that he did not feel confident that this could be done, and that he thought Mr. Barnum did not place such a construction upon the words employed by him at the conference.

Mr. Simpson returned to the office of the plaintiffs the same day, and an attempt being made to formulate an agreement, it was discovered that he took a different view in regard to the contract from that sought to be placed upon it by Mr. Forsyth, and it was concluded by the parties to submit to Mr. Barnum the two views of understanding entertained by Mr. Simpson and Mr. Doolittle, Jr., on that point, and obtain his construction of what was intended by the proposed agreement.

Mr. Simpson and said plaintiff met Senator Barnum the same evening at his hotel, and upon the presentation of the question to him he promptly stated that his intention in the proposition
106 was that interest should be paid from the 10th day of September up to such time as Mr. Ord should elect to complete, or not to complete, the purchase of the land, and no longer. Said plaintiff left Mr. Barnum without accepting his construction of the terms agreed upon at the conference.

The next morning, on meeting Mr. Forsyth, said plaintiff stated to him the construction which Mr. Barnum placed upon the terms of the conference, and told him there was no course to pursue but to accept them. Mr. Forsyth at once acquiesced. Said plaintiff, on the same day, called upon Mr. Simpson and stated to him that the Forsyths were not then able to state whether they would or would not grant the extension of the option; that they had incurred certain obligations with reference to the expected completion of the purchase on September 10 which they desired to modify before extending the option, and that within a few days a definite answer could be given to Mr. Simpson.

The negotiations as to the terms of the contract were not definitely resumed until the evening of the 3d of August, 1881, when said plaintiff notified Mr. Simpson and Mr. Ord of his acceptance of the contract as agreed upon at the conference with Mr. Barnum. Mr. Simpson and said plaintiff at once set about the formulating of the terms of the understanding.

The night of the 3d of August said attorney drafted a form of contract, and on the 4th of August submitted the same to Mr. Simpson.

The place of payment for the deferred payments of principal and interest had not been discussed between Mr. Simpson and said plaintiff. It had been understood between them that Mr. Ord would agree to pay the interest on the sum of $990,000, after the 10th of September, 1881, every fifteen days during the continuance of the extension of the option, but the place where such payments should be made had not been discussed.

It had also been ageeed that whatever notices should be given by

the parties to the contract to each other should be in writing, and it was desirable that a proper service of such notice might be had upon a representative of the parties.

Mr. Simpson, in regard to the place of the payment of the principal and interest on the deferred payment of two-thirds of a million, insisted that the parties who paid the money should have the right to designate the place of payment, and said plaintiff conceded this to him. The place of payment of the interest for each period of fifteen days was agreed upon, and the parties to whom notices could be delivered for the respective parties to the agreement were likewise agreed upon.

Mr. Simpson made several corrections in the draft of the agreement, and said plaintiff drafted the agreement thus corrected in form for execution.

107 Mr. Simpson sent to said plaintiff a copy of the contract of June 10, which Mr. Ord was to execute and deliver, and said plaintiff made a careful comparison of said copy with the original. On the 5th day of August Mr. Ord executed the agreement, dated August 4, 1881, and Mr. and Mrs. Forsyth executed a duplicate of the same. Mr. Ord likewise executed and delivered a duplicate of the contract of June 10.

Mr. Simpson insisted upon all the contracts being acknowledged, and acknowledgments were prepared upon both contracts, which were not executed, however, until the 8th day of August.

To recapitulate the several instruments signed by the parties to the transaction:

First. Jacob Forsyth gave to Milton Weston an offer or proposition of sale.

Second. Joseph P. Ord signed an agreement with Jacob Forsyth and wife, which, being presented to the Forsyths, was rejected by them.

Third. Mr. and Mrs. Forsyth executed the contract of June 10, which Mr. Ord did not accept until—

Fourth. The contract of August 4 was executed by Mr. Ord and by the Forsyths, at which time Mr. Ord executed the contract of June 10.

Those two instruments, to wit, the contract of June 10 and the contract of August 4, taken together, constituted the first contract between the parties. The minds of the parties then, for the first time, reached a common understanding, expressed in a writing executed by both parties to it.

The contract of August 4 is as follows:

PL'FFS' EX. 11.

"This agreement, made and entered into this fourth day of August, A. D. 1881, by and between Caroline M. Forsyth and Jacob Forsyth, her husband, of North township, Lake county, State of Indiana, parties of the first part, and Joseph P. Ord, of the borough of Princeton, county of Mercer, and State of New Jersey, party of the second part, witnesseth:

"1. That this agreement is supplemental to the certain articles of agreement between the same parties, dated June 10, A. D. 1881.

"2. That the time within which the party of the second part may (exercise the option given him by said articles and) pay the sum of $333,333.33, is hereby extended to the 10th day of November, A. D. 1881; and the time within which the party of the second part may secure the payment of the deferred payment of $666,666.67 is likewise extended to the 10th day of November, A. D. 1881; and the time within which the parties of the first part shall be required to
108 deliver or tender a deed of the lands mentioned in said contract, shall be extended to the 10th day of November, 1881; but if the party of the second part is ready to complete the purchase and make the payment aforesaid at an earlier day, the parties of the first part shall deliver said deed upon reasonable demand of the party of the second part.

"Time is made of the essence of this contract, and after November 10, 1881, the party of the second part shall have and claim no right to exercise his said option, but the same shall be absolutely void and of no effect.

"3. That as a substitute for the mode or modes of paying and securing the said deferred payment of $666,666.67 contained in said articles of June 10, 1881, it is agreed by and between the parties hereto that upon and simultaneously with the delivery of the deed from the parties of the first part to the party of the second part, or his assigns, and the payment of the said payment of $333,333.33 in the manner provided in said articles, the party of the second part or his assigns shall execute and deliver to said Caroline M. Forsyth a mortgage upon said lands conveyed to secure the payment of the sum of $666,666.67, the remainder of the purchase-money of said lands, the same to be paid in the manner following:

"Six annual payments of one hundred thousand dollars each, payable *seriatim* on the first day of January, A. D. 1883, and annually thereafter, and one payment of $666,666.67, payable on the first day of January, A. D. 1889, all of said payments bearing interest at the rate of six per centum per annum from June 10, 1881, payable semi-annually on the first day of January and July in each year until fully paid.

"Principal and interest shall be payable at such place in the city of New York as may be designated by the parties of the first part, to be fixed in the mortgage. But it is expressly understood and agreed that the mortgagor or his assigns shall have the right to pay said indebtedness, or any part thereof, at any time before maturity.

"The said mortgage shall contain a clause that upon default in the payment of interest, or any part thereof, when it shall become due, or upon default in the payment of any instalment of the principal, or any part thereof, when it shall become due, the whole amount of such indebtedness remaining unpaid, both principal and interest, shall at once become due and payable, without demand or notice.

"4. That it is agreed that the time within which said Caroline M.

Forsyth may elect to retain the portion of said lands described in said articles of June 10, 1881, in connection with her right to
109 such election, shall be extended until the 10th day of October, A. D. 1881, or, in case said purchase is completed at an earlier day, until she is notified of the readiness of the party of the second part or his assigns to receive the delivery of the deed.

"5. In consideration of the above agreement extending the time of performance of said contract of June 10, 1881, and for the further consideration of one dollar, in hand paid to the party of the second part by the parties of the first part, the receipt whereof is hereby acknowledged, the party of the second part covenants and agrees to and with the parties of the first part to pay a sum of money equal to the interest, at the rate of six per centum per annum, upon the sum of nine hundred and ninety thousand dollars ($990,000), from the 10th day of September, A. D. 1881, until such time after said 10th day of September, 1881, as the party of the second part or his assigns may elect either to purchase or not to purchase said lands contained in said articles of June 10, 1881, as modified by these presents, but not longer than until said 10th day of November, A. D. 1881.

"The said money so accruing shall be paid to said Caroline M. Forsyth or order at the expiration of each period of fifteen days during the continuance of the right to said option at the Illinois Trust and Savings Bank, in the city of Chicago, State of Illinois.

"Upon the abandonment of said contract of purchase by the party of the second part or his assigns before November 10, 1881, his liability and their liability to pay such interest for the unexpired portion of the period of said option shall cease.

"In case of the completion of the purchase provided for in said articles of agreement, so much of the money as shall equal the interest on the sum of $666,666.67, at six per centum per annum from September 10, 1881, up to the time of the delivery of the deed, as shall have been paid under the terms of this article 5 of this agreement, shall be applied to the payment of the interest on said deferred payment of $666,666.67, accrued thereon since June 10, 1881.

"6. All notices which may be given by the respective parties hereto to each other, under these articles, and the articles of June 10, 1881, shall be in writing, and may be delivered personally; and notices addressed to the party of the second part, or his assigns, may be delivered to E. G. Mason or A. B. Mason at their office, No. 40 Dearborn street, in the city of Chicago; and notices addressed to the parties of the first part may be delivered at the office of Doolittle & McKey, 184 Dearborn street, in the city of Chicago, to either of the members of the firm, as follows: J. R. Doolittle, J. R. Doolittle, Jr., Henry McKey.

110 "In testimony whereof the parties hereto have hereunto set their hands and seals, this 4th day of August, A. D. 1881.

"J. P. ORD. [SEAL.]

"———— ————. [SEAL.]

"Signed, sealed, and delivered in presence of—

"J. W. SIMPSON,

"As to J. P. ORD."

The plaintiffs advised the defendants that the advantages secured by the completion of the negotiations at this point were:

First. The minds of the contracting parties were brought together upon a common basis of agreement, thus making it possible to make a sale of the lands to Mr. Ord.

Second. The contract of June 10 was accepted by Mr. Ord, thus avoiding the danger of its repudiation by him and a suit to recover the $10,000 paid by Weston.

Third. All modes looking to the payment and the securing of the deferred payment of two-thirds of a million were swept away, except a simple mortgage upon the land to be conveyed, thus avoiding the future consideration and determination of the question as to the power of the East Chicago Improvement Company, when organized, to acquire the title to the lands in question and execute a valid mortgage thereof to secure its bonds.

Fourth. While the period of the option was extended to the 10th of November the time within which Mr. Ord should pass upon the sufficiency of the title was not extended.

Fifth. From the 10th of September, 1881, during the continuance of the option said Ord was called upon to pay to the Forsyths $165 a day, payable at the expiration of each period of fifteen days from that date. In case of the failure to complete the purchase the money so paid would belong to Mrs. Forsyth absolutely. In case of the completion of the sale, so much of said money as should equal the interest on $3,333,333.33 from the 10th day of September, 1881, up to the time of the delivery of the deed of conveyance should be retained by Mrs. Forsyth and the remainder only should be applied upon the interest on the deferred payment of two-thirds of a million.

Sixth. The time within which Mrs. Forsyth could elect to retain the reservation was extended to the 10th of October.

Early in September Mr. Forsyth had interviews with said plaintiff, J. R. Doolittle, Jr., in regard to certain option contracts
111 taken separately by himself, his wife, and two of their sons, affecting several tracts of land, some of which adjoined, and others of which were near the lands mentioned in the contract with Mr. Ord, stating that some of these option contracts had been taken in expectation of the completion of the sale to Mr. Ord on the 10th of September, 1881, and would expire within a few weeks after that date; that it was the intention of the Forsyths to purchase such of the lands covered by said option contracts as they saw fit, and pay the price out of the purchase-money Mr. Ord should pay, and that the extension of the option given to Mr. Ord until the 10th of November, 1881, left several of these option contracts in peril. Mr. Forsyth stated that the defendants were extremely anxious to raise money enough either to pay the price of certain tracts of the land or to make new arrangements with the owners for the extension of the options, and were desirous, if it were possible, to obtain a larger payment of money from Mr. Ord before the completion of the sale to him.

The suit to foreclose the Pierson mortgage was also considered by said plaintiff and Mr. Forsyth about that time, and the question was discussed between them as to whether the complainants in the foreclosure suit might not dismiss their bill, or, without a dismissal of their bill, bring an action upon the notes secured by the Pierson mortgage (in another jurisdiction), and in some way reach the fund, which, under the articles of June 10th, was to be deposited with the Mercantile Trust Company as an indemnity to the purchaser of the lands against the lien of the Pierson mortgage; and it was concluded by said plaintiff to be advisable to secure a modification in the agreement with Mr. Ord, whereby the said fund, instead of being deposited in the Mercantile Trust Company at the city of New York, should be deposited in Indiana, where it could not, under any circumstances, be reached by attachment; and he stated to Mr. Forsyth that perhaps Mr. Ord might be induced to waive the deposit of such security out of the first payment of a third of a million under the contract, and hold instead a portion of the deferred payments of two-thirds of a million as an indemnity against the lien of said mortgage.

Said plaintiff opened negotiations with Mr. A. B. Mason, the counsel of Mr. Ord, looking to this end. On the 8th, 9th, and 10th of September said plaintiff had interviews with Mr. Mason upon the subject, and drew provisions of a contract, for the purpose of securing a modification of the existing contract, so as to transfer the security from the first payment to the deferred payments, which draft Mr. Mason stated he would take to New York with him the next week.

In view of the fact that the proposed modification could only be definitely passed upon in New York, it was decided by Mr.
112 Forsyth that said plaintiff should go to the city of New York and present the matter to Mr. Ord and his associates.

On the 14th of September said plaintiff went to New York, and on the 16th of September had an interview with Mr. John W. Simpson, at the office of the firm of Alexander & Green. He had daily interviews (Sundays excepted) with Mr. Simpson or with Mr. Ord from the 16th of September to the 24th of September. Mr. Simpson stated that the indemnity against the Pierson mortgage could not be transferred from the first payment to the deferred payments, and that the associates of Mr. Ord did not wish to make any modifications whatever in the existing agreements. Said plaintiff presented to Mr. Simpson and to Mr. Ord the importance to the defendants of raising from twenty-five to fifty thousand dollars in order to carry the said option contracts, and offered, on behalf of Mrs. Forsyth, in case one or more of Mr. Ord's associates would advance such sum of money, to pay six or seven per cent. interest upon it, and repay the principal out of the first payment of $333,333.33 to be made under the contract with Mr. Ord, the money so advanced not to be repaid unless such payment should be made under the Ord contract. This proposition was not accepted by Mr. Ord, he stating that the status of the enterprise at that time was not such that such a measure would be practicable.

Said plaintiff then discussed with Mr. Ord and very fully with Mr. Simpson the proposition of having the indemnity fund deposited in Indiana instead of with the Mercantile Trust Company, and drew a contract covering this point, and submitted the same to Mr. Simpson. It was discussed, modified, and altered by Mr. Simpson, Mr. A. B. Mason, of Chicago, and by said plaintiff, and, finally, the terms of the agreement were arrived at on the 24th of September, a draft of which, after being engrossed, was taken by said plaintiff with him on his return to Chicago. Said agreement was executed by Mr. and Mrs. Forsyth on the 28th day of September, and by Mr. Ord, in duplicate, a few days later, and is as follows:

PL'FFS' EX. 12.

"Memorandum modifying the mode of payment prescribed in the articles of agreement dated June 10, 1881, and the articles supplemental thereto, dated August 4th, 1881, made and entered into by and between Caroline M. Forsyth and Jacob Forsyth, of the first part, and Joseph P. Ord, of the second part.

"First. It is hereby declared and the mortgage to be given by the party of the second part or his assigns shall contain a provision declaring that the purpose and intent of said mortgage is to create and enforce merely a lien upon said lands in favor of the vendor, Caroline M. Forsyth, for the unpaid purchase-money thereof and the interest thereon, without creating any personal obligation
113 whatever against the said mortgagor. And it is expressly covenanted and agreed that the said Caroline M. Forsyth, her legal representatives and assigns, shall have no right of action against said vendee or mortgagor, personally, or his assigns, for any part of the purchase-money of said lands or the interest thereon, the said mortgaged lands to be treated as the sole fund or security for the payment of said purchase-money and interest, anything in said mortgage or in this instrument or in any other writing or agreement between said parties to the contrary notwithstanding.

"Second. The provision in the contract of June 10, 1881, providing for the deposit of the sum of two hundred and five thousand dollars, part of the first payment of $323,333.33, with the Mercantile Trust Company, in trust, shall be operative in case at the time of the making of said first payment the said suit now pending in the circuit court of the United States for the district of Indiana, seeking the foreclosure of said mortgage or deed of trust to John O. Pierson, in which cause Aquila Adams, Axel Dearborn, Asaph Churchill, and John O. Pierson, trustee, are complainants, and Caroline M. Forsyth, Jacob Forsyth, and others, are defendants, shall have been dismissed or discontinued without going to a decree. But in case said suit shall be pending, or a decree shall have been entered therein at the time of the making of said first payment, then the party of the second party shall intervene in said suit, attaching to his intervening petition a certified check to the order of Caroline M. Forsyth for $210,000 (two hundred and ten thousand dollars), and offer to pay the sum of $210,000 into the registry of said court to

abide the result of said suit, provided the said court will thereupon enter a decree releasing said lands from the lien of said mortgage, and substituting the said moneys so paid in place of said land land as security for the debt claimed to be represented by said mortgage, and shall direct proper and full release of said mortgage to be made, executed, and delivered to said second party upon the payment into the registry of said court of said sum of $210,000, said money to be subject to any decree of said court, but in all other respects to be subject to the control and disposition of said Caroline M. Forsyth, and upon the granting of the prayer of said petition, in order to secure the entry of such decree, the said check shall be endorsed by said Caroline M. Forsyth, and the money deposited in the registry of said court. Nothing herein contained shall be here or elsewhere construed as an admission by the parties of the first part of the validity or amount of the claim set up by the complainants in said foreclosure suit.

"Third. In case the court shall refuse to make an order discharging said lands from the lien of said Pierson mortgage, the
114 said certified check shall be withdrawn and deposited with the Mercantile Trust Company upon the conditions and trusts provided in said articles of June 10, 1881.

"Fourth. In case the said court, upon the hearing of said intervening suit, should require, as a condition to the entry of a decree discharging said lands from the lien of said Pierson mortgage, the deposit of a larger sum of money than two hundered and ten thousand dollars, the excess over and above said sum shall be so deposited by the parties of the first part within thirty days after the entry of such order by said court.

"Fifth. All installments of principal included in the deferred portion of the purchase-money, $666,666.67, and the semi-annual interest, shall be payable at the office of the Mercantile Trust Company of New York, but the said Caroline M. Forsyth may from time to time direct the payment of particular instalments of principal or of interest in the city of Chicago, or city of Indianapolis, by giving to the mortgagor in said mortgage thirty days' notice in writing before such instalment shall be payable, specifying some bank in the city of Chicago or the city of Indianapolis as the place of payment; the expense, if any, of making such payment at the place indicated in such notice, instead of in New York, shall be charged to said Caroline M. Forsyth, and deducted from the amount of the payment.

"Sixth. The deed and mortgage hereby agreed to be delivered shall be delivered, and the payments hereby agreed to be made on delivery of said deed shall be made, at the office of E. G. & A. B. Mason, in the city of Chicago, at twelve o'clock noon, on the 10th day of November, A. D. 1881, or such earlier day as the party of the second part or his assigns shall designate. And in case the party of the second part or his assigns shall designate an earlier day, ten days' notice thereof shall be given to the said parties of the first part or their attorneys, Messrs. Doolittle & McKey. And it is agreed that in case the party of the second part or his assigns shall give notice of election not to complete the purchase of said lands, or shall fail

to give notice of election to complete such purchase, on or before November 10, 1881, the sum of ten thousand dollars already paid on said contract of June 10 shall thereupon and thereby be and become forfeited to the parties of the first part absolutely without the tender of a deed.

"Seventh. All payments to be made by the party of the second part or his assigns under said agreement of June 10, 1881, or any memorandum modifying or supplementing the same, may be made in certified checks upon any bank in the city of New York or in the city of Chicago, or in the certificates of deposit issued by the Mercantile Trust Company and duly endorsed. This provision is merely for convenience in making payments; the party of the second
115 part or his assigns will be held to guarantee the payment of all such checks or certificates of deposit on presentment if presented in due course of business.

"In testimony whereof the parties hereto have hereunto set their hands and seals, this 28th day of September, A. D. one thousand eight hundred and eighty-one.

"J. P. ORD.

"Signed, sealed, and delivered in the presence of—
"JAS. G. JAMWAY,
As to "J. P. ORD."

Said plaintiff returned to Chicago on the 27th day of September, and on meeting Mr. Forsyth stated to him that the contract which he brought with him was the best which could possibly be obtained under the circumstances; that Mr. Simpson refused to transfer the indemnity to the deferred payments, and that Mr. Ord stated that, while he thought it probable that the purchase of the lands would be made, he could not promise that it would be done; that the association which he represented had no funds in hand which it could advance to the defendants to carry the options, and that the individuals composing the association would not advance the money in the present condition of the enterprise. And said plaintiff advised the defendants that the principal advantages obtained by this modification of the contract were as follows:

First. The absolute forfeiture of the $10,000 paid down on the delivery of the contract of June 10 without the tender of a deed, in case the said Ord should determine not to complete the purchase of the land.

Second. The deposit of the indemnity fund in the State of Indiana, in case the foreclosure suit under the Pierson mortgage should be pending at the time of the first payment under the contract with Ord. If the court should, in said foreclosure suit, enter a decree transferring the lien of the mortgage to the indemnity fund, it would enable Mrs. Forsyth to make a tender of the amount which she admitted to be due under the mortgage, and to file a cross-bill in the suit, making use of the money so deposited in offering to pay and discharge the amount due upon the mortgage, by doing which, if her tender should be sufficient, she would enabled to stop the run-

ning of interest on the mortgage debt, which was at the rate of ten per cent. per annum since October 1, A. D. 1880.

Third. The agreement gave Mrs. Forsyth the right to direct whether any payment of principal or interest should be paid at the Mercantile Trust Company of New York, or in the city of Indianapolis, Indiana, or in the city of Chicago, Illinois, enabling her, in case it were deemed necessary in order to avoid an attachment of the money, to direct where it should be paid.

Fourth. While, to accommodate Mr. Ord, the instrument provided for the payment of the payments provided under the con-
116 tract in checks, thus obviating the inconvenience of making payments in money, it provided that Mr. Ord should be held to guarantee the payment of all such checks on presentment, if presented in due course of business.

The contract, dated September 28, provided that in case the foreclosure suit of Adams *et al. v.* Forsyth *et al.* should be pending or a decree should have been entered therein at the time of the making of the first payment of $3.3,333.33, Mr. Ord should intervene in the suit and attach to his intervening petition a certified check to the order of Caroline M. Forsyth for the sum of $210,000, and offer to pay the same into the registry of the court to abide the result of said suit, provided the court would thereupon enter a decree releasing the lands from the lien of the Pierson mortgage, and upon the entering of the decree Mrs. Forsyth should endorse the check and the money should be deposited in the registry of the court.

Said plaintiffs had several interviews with the counsel of Mr. Ord, Mr. A. B. Mason, on the subject of the preparation of said intervening petition. On the 14th of October said counsel of Mr. Ord submitted to the plaintiffs a draft of the intervening petition to be filed by Mr. Ord. On the 15th and 17th of October said plaintiff, J. R. Doolittle, Jr., had interviews with the counsel of Mr. Ord upon the subject, and suggested the importance of having Mrs. Forsyth unite with Mr. Ord in some form in the *in the* intervening petition, so far, at least, as to inform the court that the money offered to be deposited belonged to her; that the offer was made with her consent and approval, and that the prayer of the petition for the discharge of the lien of the mortgage upon the lands, and the substitution of the money as a security for the mortgage debt, was made with her consent. On the 18th of October the plaintiffs prepared a form of petition on behalf of Mrs. Forsyth to be annexed to the intervening petition of Mr. Ord, and on the 19th of October submitted the same to the counsel of Mr. Ord, and secured his approval of it.

The intervening petition of Mr. Ord and the supplemental petition of Mrs. Forsyth were not filed in said foreclosure case. The complainants in said cause on the 25th of October dismissed the same voluntarily without prejudice. Knowledge of this proceeding did not reach the plaintiffs until the 2d day of November, 1881. Thereupon the plaintiffs caused a motion to be entered in said court to reinstate said cause, and advised the defendants to file a bill to redeem said lands from the mortgage to Pierson, in case the sale of said property to Mr. Ord should be completed under the con-

tracts with him, and provided they should be able to modify the existing contracts to such an extent as to permit such action, and advised the defendants that, in case the dismissal of said foreclosure suit were held valid by said court under the
117 contract of September 28, the sum of $210,000, part of said first payment, would be deposited with the Mercantile Trust Company of New York, under the terms and conditions mentioned in the contract of June 10, and the holders of the notes secured by the Pierson trust deed might, or might not, commence another foreclosure suit; and that, in case of the neglect of the holders of such notes to seek to enforce them by the foreclosure of the mortgage, an indefinite delay might occur in the payment of the indebtedness, during which period interest would run upon it at the rate of ten per centum per annum; and that, in case Mrs. Forsyth should seek to pay the notes and recover the possession of them, she would be obliged to go either to Massachusetts or to Connecticut for the purpose; and that, in case $210,000 of the first payment should be deposited with the Mercantile Trust Company, she would not have at hand a sufficient amount to make a tender of the debt until after subsequent payments to her under her mortgage for two-thirds of a million. The plaintiffs also advised the defendants that in case the holders of said notes should seek to collect the same out of the indemnity fund deposited with the Mercantile Trust Company at New York, they might be able, by an attachment proceeding, or some other mode, to compel the litigation upon the notes in the city of New York, and thus cause the Forsyths the trouble of trying the case at a remote point from their place of residence.

The plaintiffs also advised the defendants that a bill to redeem from the Pierson mortgage could be filed in the United States circuit court for the district of Indiana, for the reason that the lands were situated within the district, and the parties necessary to be made defendants were all residents of other States, but that the bill to redeem could not be filed under the existing contracts, for the reason that Mrs. Forsyth would not be able to tender a sufficient amount of money.

The plaintiffs at once commenced negotiations with Mr. Mason, the counsel of Mr. Ord, on the subject, and had interviews with him on the 3d, 4th, 5th, and 7th of November. Mr. Mason, at first, objected to the payment of money at Indianapolis, but finally agreed to the delivery of the deed and mortgage (on completing the sale) and the payment of a part of the first payment at Crown Point, the county seat of Lake county, Indiana, where the lands were situated; and also to the filing of a bill to redeem from the Pierson mortgage, and to the deposit of $210,000 (part of such first payment) in the registry of the United States circuit court for the district of Indiana.

On the 7th of November a contract bearing that date was agreed upon, drawn up (by the plaintiffs and the said counsel of Mr. Ord) and executed by Mr. and Mrs. Forsyth in the office of the
118 plaintiffs; but on the 8th of November the counsel of Mr.

Ord notified the plaintiffs that he had concluded not to execute said contract on behalf Mr. Ord.

One of said plaintiffs, J. R. Doolittle, Jr., called upon him on the 8th of November, and by agreeing to modify said contract secured the execution of it, as modified, on behalf of Mr. Ord.

Said contract is as follows:

Pl'ffs' Ex. 13.

"This supplemental agreement, made at the city of Chicago the seventh day of November, A. D. 1881, by and between Caroline M. Forsyth and Jacob Forsyth, parties of the first part, and Joseph P. Ord, party of the second part, witnesseth:

"That, in lieu of all methods of payment heretofore provide as to the three hundred and twenty-three thousand three hundred and thirty-three and $\frac{33}{100}$ ($323,333.33) dollars, which will be due said Caroline M. Forsyth November 10, A. D. 1881, under the agreement of June 10, 1881, as subsequently modified, by and between said parties hereto, the said payment shall be made in the following manner:

"First. The sum of one hundred and thirteen thousand three hundred thirty-three and $\frac{33}{100}$ ($113,333.33) dollars shall be paid said Caroline M. Forsyth in cash or a certified check, subject to the conditions, as to said check, of the supplemental agreement of Sept. 28, 1881, by and between the parties of the first part and said Ord, provided that if the title to the E. $\frac{1}{2}$ S. W. $\frac{1}{4}$ and W. $\frac{1}{2}$ S. E. $\frac{1}{4}$, sec. 16, T. 37 N., R. 9 W., 2nd principal meridian, is not perfected when the deed is given, then E. G. and A. B. Mason shall hold the sum of five thousand ($5,000.00) dollars, to be paid said Caroline M. Forsyth when said title is perfected, the same to be perfected within a reasonable time, and if the ditch liens on the premises conveyed have not been paid or extinguished, then E. G. and A. B. Mason are to hold the sum of eight thousand three hundred and thirty-three and $\frac{33}{100}$ ($8,333.33) dollars until the same are paid or extinguished, said sums of $5,000.00 and $8,333.33 to be deducted from the $113,333.33 as aforesaid.

"Second. The said party of the first part will forthwith file a bill to redeem said premises from the lien of the mortgage indebtedness, and will pay at the time of filing their said bill to redeem into court the sum of $135,000.00, and said Ord or his assigns will file his intervening petition in said cause, praying for a transfer of the mortgage liens from the lands to the fund in court, and will pay into court the sum of $75,000.00 with said petition, the expenses of such proceeding, whether by bill to redeem or by intervening petition, to be defrayed by said party of the first part.

119 "Third. The said Caroline M. Forsyth shall give a receipt for the sum of $333,333.33, and the court deposits shall be wholly at her risk, and shall not be withdrawn or applied to any other purpose until said mortgage debt is paid, or the lien thereof released from the lands conveyed to said Ord, or his assigns, but any part of said $210,000.00 remaining after such payment or release of said mortgage shall be paid to said Caroline M. Forsyth.

"And this agreement further witnesseth that the deed and mort-

gage to be exchanged between the parties hereto, and the moneys to be paid on the 10th day of November, A. D. 1881, shall be exchanged and paid at the town of Crown Point, in the county of Lake and State of Indiana, on said day, as soon as possible after the arrival of the morning train from the city of Chicago, at Crown Point, on said day, and that the additional cost to said second party of making said payment at said Crown Point, instead of at the city of Chicago, to wit, the expenses of two persons from said city of Chicago to said Crown Point and back shall be paid by said first party.

"In witness whereof the parties hereto have hereto set their hands and seals the day, year, and place first above written.

"JOSEPH P. ORD, [SEAL.]
"By E. G. & A. B. MASON, [SEAL.]
"*His Att'ys-in-fact.* [SEAL.]

"This agreement is delivered on the understanding that the said Caroline M. Forsyth will provide a special train, if necessary, to take all necessary persons to Crown Point, said train to leave Chicago in a reasonable time, not less than one hour after Wm. C. Gulliver's arrival in Chicago, and that this is the train referred to in said agreement.

"E. G. & A. B. MASON,
"*Att'ys of Joseph P. Ord.*"

The plaintiffs were charged by the defendants with the responsibility and labor of carrying out the details of the contracts in said transaction, and, among other things, arranged with Mr. Ord, at New York, in September; as to the time when the payment, for the first period of fifteen days, should be made under the contract of August 4; and subsequently, at Chicago, drew receipts at different times for the various payments accruing under said contract as they matured, up to and including the 9th day of November.

Mrs. Forsyth concluded to exercise her option to retain the reserved tract described in the contract of June 10, and the plaintiffs prepared a notice of such election, and on October 8 served the same upon Messrs. E. G. & A. B. Mason, and advised the defend-
120 ants of the necessity of a survey being made to ascertain the exact acreage in the reservation, in order to know the amount of land which must be purchased and, under the contract of June 10, substituted for the reservation; and, when the survey was made, discussed with the counsel of Mr. Ord the acreage shown by the survey, and agreed with said counsel to modify the contract in regard to the reservation, so that Mrs. Forsyth should convey a part of it to Mr. Ord and retain a part of it from sale, and that Mrs. Forsyth should convey one hundred and sixty acres of other lands in place of the land so retained by her.

The plaintiffs, on the 7th of November, aided the defendants in making a loan of enough money to purchase the lands, to be substituted for the land so reserved.

A question was raised by Mr. A. B. Mason, in conference with the plaintiffs, as to the proper construction of the contracts between Mr.

Ord and the Forsyths in regard to the effect of the giving by Mr. Ord of a notice of election to take the lands, and as to the application to be made of the moneys paid at intervals of fifteen days, under the contract of August 4.

PHILADELPHIA BAR ASSOCIATION

As to the giving of the notice of election, he contended that it would operate to suspend the payments under the contract of August 4; and, as to the application of the money paid thereunder, he claimed that all of the same should be applied as a payment of interest on the deferred payment of $666,666.67.

One of said plaintiffs, J. R. Doolittle, Jr., examined the contracts thoroughly, and on October 21 wrote to the counsel of Mr. Ord (among other things) as follows:

PL'FFS' EX. 45.

"I find, on examination of the contracts between Mr. Ord and Mr. and Mrs. Forsyth, that I reach a somewhat different conclusion from the one you have arrived at in regard to the effect of the service of a notice of election to take the lands.

"Article V of the agreement of August 4th, which provides for the payment of certain sums at intervals of fifteen days, recites as follows: 'From the 10th day of September, A. D. 1881, until such time after said 10th day of September, 1881, as the party of the second part or his assigns may elect either to purchase or not to purchase said lands contained in said articles of June 10, 1881, as modified by these presents, but not longer than until said 10th day of November, A. D. 1881.'

"Notice of election to purchase at a future day is not an election to purchase, but a notice of the intention of the purchaser to exercise his option to purchase and complete the purchase on the day named. If the agreement had provided that the payments
121 referred to should cease on giving notice of election, it would be different. The option extended to November 10th, and could have been exercised by completing the purchase at any intermediate time.

"I am strongly persuaded that the election is an election to purchase and not an election to give notice of purchase at a future day. I can see great propriety in this view, also, aside from the context of the agreement, in the fact that interest is allowed on the sum of $323,333.33 from Sept. 10, 1881, because it was then payable and not paid. Interest ought to be allowed on that sum until the time when the money shall leave the hands of the purchaser and reach the hands of the seller.

"My view is that if the purchase is not made until Nov. 10th interest should be paid on the sum of $990,000 up to and including Nov. 9th.

"In regard to the question of interest and the payments hereafter to be made, I have made a computation, based upon the assumption that the deeds will be exchanged Nov. 10, the results of which I give below:

"Oct. 24th	$2,475 00
"Nov. 8th	2,475 00
"Nov. 9th, one day	165 00
"Nov. 10th	323,333 33

"On January 1, 1882, there would be due as interest on $666,666.67 from June 10, 1881, 6 mos., 20 days, $22,222.22, less the interest on said sum already paid, from and including Sept. 10 to and including Nov. 9, 61 days, amounting to $6,777.77, leaving the interest payment due Jan. 1, 1882, $15,444.45."

Mr. A. B. Mason subsequently notified the plaintiffs of his acceptance of the construction of the contracts placed upon them by the plaintiffs.

On the 10th of November one of the plaintiffs, J. R. Doolittle, Jr., accompanied Mr. and Mrs. Forsyth, William W. Green, William C. Gulliver, of New York, and Mr. A. B. Mason, the counsel of Mr. Ord and of William W. Green, to Crown Point, and superintended, with Mr. Mason, the delivery of the deed and the mortgage for $666,666.67, and the payment of the sum of $113,333.33, together with many other minor details connected with the transfer, among other things, examining an assignment of the said contracts from Joseph P. Ord to John W. Simpson and an assignment from John W. Simpson to William W. Green.

On the 11th of November, 1881, said plaintiff, together with Mr. and Mrs. Forsyth, Mr. Mason, and William C. Gulliver, were present at Indianapolis, in the State of Indiana, and filed a bill to redeem the lands conveyed by Mrs. Forsyth to William W.
122 Green from the lien of the Pierson mortgage, and deposited a check, endorsed by Mrs. Forsyth, in the registry of said court for the sum of $135,000; and at the same time Mr. Mason, on behalf of the East Chicago Improvement Company, the grantee of William W. Green, filed an intervening petition in said suit, and deposited with said petition, in the registry of said court, a check for $75,000, payable to the order of Caroline M. Forsyth and endorsed by her.

Said plaintiff and said Mr. Mason superintended and directed all of the various steps required for the commencement of said suit and the filing of said bill and intervening petition therein, and drew, formulated, and signed a stipulation specifying the terms and conditions upon which the said sums of money, aggregating $210,000, were so deposited in said court.

Upon the foregoing statement of facts, assumed to be true, what, in your opinion, would be a reasonable compensation for the services of the plaintiffs?

In forming your opinion you will consider the services of the plaintiffs in the negotiation and drawing of said contracts between the defendants and Joseph P. Ord and in carrying out and completing said contracts in detail as stated.

You will consider the services of the plaintiffs in so negotiating and framing said contracts as to enable the defendants to make the sale under the contracts and continue the litigation of the Pierson

mortgage, and in providing for the filing of the bill to redeem said mortgage as stated, but you will exclude from consideration the services of the plaintiffs, as solicitors for the defendants, in the suit of Adams *et al. v.* Forsyth *et al.*, in the United States circuit court for the eastern district of Indiana, to foreclose said mortgage, and the services of the plaintiffs, as such solicitors, in the preparation and filing of the bill to redeem from said mortgage as stated.

123 Hypothetical statement No. 2 is as follows:

Upon the following statement of facts assumed to be true, to wit: At the time of the interviews between the plaintiffs and Milton Weston in June, A. D. 1881, heretofore referred to hypothetically, the defendants stated to the plaintiffs, or informed the plaintiffs, that they intended to pay a commission to Daniel H. Horne for services rendered in the negotiations of the sale, but did not, at that time, state to plaintiffs the amount or percentage of such commission.

On the 10th day of June, at or about the time when the defendants executed said contract, bearing date June 10th, between Jacob and Caroline M. Forsyth, of the one part, and Joseph P. Ord, of the other, the defendants notified the plaintiffs that the commission to be paid to Daniel H. Horne was to be five per cent. of the purchase-money on the gross purchase price. The plaintiffs protested against the making of any such contract with said Horne, and stated to the defendants that it was a useless and expensive proceeding, and that, in their opinion, it would be of little or no value to the defendants. The defendant, Jacob Forsyth, then stated to the plaintiffs that the whole amount of the commission was not intended for said Horne; that Milton Weston was interested in it to the extent of one-half; and also stated to the plaintiffs that he, Jacob Forsyth, had already executed an agreement with said Horne providing for the payment of a commission of five per cent. on one million dollars, or whatever price the land might be sold for. He also informed the plaintiffs that said Horne wanted a contract signed by both Jacob Forsyth and Caroline M. Forsyth, and that he would request said Horne to call at the office of the plaintiffs, where such a contract could be drawn up and executed.

The plaintiffs consulted with the defendant, Caroline M. Forsyth, in regard to the drawing of such a contract with Daniel H.
124 Horne, and stated to her that a contract of such a character should be drawn with great care, and the payment under it should be made entirely conditional upon the completion of the sale to Mr. Ord and the payment of the money thereon. The defendant, Caroline M. Forsyth, stated to the plaintiffs that she knew very little about the proposed contract with Horne, but that it was an arrangement which her husband had made, and she would be obliged to carry it out. The plaintiffs stated to her that if she had concluded to execute such a contract, they would prepare it in such a form that in case of the failure of the sale said Horne could have no claim against her for commissions. And thereupon the plaintiffs prepared a contract as follows:

PL'FFS' EX. 33.

"Whereas an agreement has been made and entered into this 10th day of June, A. D. 1881, by and between Jacob Forsyth and Caroline M. Forsyth, his wife, and Joseph P. Ord, of Princeton, New Jersey, giving to said Ord the right to purchase within ninety days from this date from said Jacob and Caroline M. Forsyth eight thousand acres of land, more or less, for the sum of one million of dollars, according to the terms of said agreement, which are hereby referred to:

Now, therefore, it is agreed by and between said Jacob Forsyth and Caroline M. Forsyth, parties of the first part, and Daniel H. Horne, party of the second part, that if the sale contemplated in said agreement with Ord shall be made and completed as therein provided, the parties of the first part will pay to said Horne, party of the second part, as compensation for his services in negotiating said sale, the sum of five per cent. on the gross purchase price of said lands. But it is expressly understood that said five per cent. compensation is to be paid out of the payment of three hundred and twenty-three thousand three hundred and thirty-three dollars and thirty-three cents, provided for in said agreement with Ord, and not otherwise; and if said sale is not in fact completed and said money paid, for any cause whatever, no compensation shall be paid by the parties of the first part to the party of the second part for any services he may have performed in endeavoring to effect said sale, and this agreement shall be wholly void and of no effect.

"Chicago, June 10, 1881."

On the same day Daniel H. Horne called at the office of the plaintiffs and discussed with them the terms and provisions of said contract, and plaintiffs notified him that they would not advise the defendant, Caroline M. Forsyth, to execute any other contract than the above The said contract so drawn was executed by the defendants and by Daniel H. Horne.

Later on, after the 11th of July, 1881, when discussions and negotiations were had between the plaintiffs and Joseph P. Ord and his counsel, Alfred Bishop Mason, in regard to the contract between said Ord and the defendants, the plaintiffs called the attention of the defendants to the fact that the negotiations were all at sea, and that said Danief H. Horne was neither rendering, nor was it possible for him to render, any assistance whatever in the negotiations which were going on.

On the 30th of July, 1881, after the negotiations with reference to the sale of the land with Senator Barnum and John W. Simpson, as representing Joseph P. Ord, had reached, substantially, the basis of an agreement between the parties, although the plaintiffs had not at that time definitely notified Mr. Ord or his counsel of the acceptance of the terms considered during said negotiations, the plaintiffs stated to the defendants that, in their opinion, an effort should be made to cancel or materially reduce the compensation speci-

126 fied in the said contract with Daniel H. Horne, and said to the defendants that there was no reason or justice in allowing said Horne to receive $50,000 for work which he had not done, but which had been done and was being done by the plaintiffs. The defendant, Jacob Forsyth, stated to the plaintiffs that he would be glad to reduce the Horne contract, but said that he did not believe it could be done; that the contract was out in the hands of said Horne and he did not think that he could be compelled to surrender it or reduce the percentage therein contained. The plaintiffs stated that they would endeavor to do so, and thought, perhaps, the amount of commission might be materially reduced without imperiling the consummation of a contract with Mr. Ord.

The plaintiffs, on the 30th of July, notified the counsel of Mr. Ord that they were not yet able to give a definite answer as to whether a contract would be made between the defendants and Joseph P. Ord, but stated that probably a contract could be made if the defendants should be able to modify certain existing obligations which they had incurred.

The plaintiffs communicated with the said Daniel H. Horne and requested an interview with him, which occurred on the same day at the plaintiffs' office. The plaintiffs stated to said Horne that the contract with Mr. Ord had not yet been negotiated; that Senator Barnum had stated to the plaintiffs that the sale would not be completed on the 10th of September; that the work of negotiating the contract had been done and performed by the plaintiffs, and not by Mr. Horne, and that there was no justice or right in his receiving the sum of $50,000 for what he had done in the matter, and suggested to Mr. Horne that his contract for a commission should be reduced to $5,000. Mr. Horne replied to this statement of the plaintiffs that he had his contract and that he would collect the commission whenever the sale was completed. The plaintiffs stated
127 to Mr. Horne that by the terms of his contract he was only entitled to the commission, in case the said contract of June 10th between the defendants and Joseph P. Ord should be performed in terms, and that if Mr. Horne insisted upon retaining his contract for five per cent. on the purchase price, the contract of June 10th with Joseph P. Ord would be allowed to expire, by limitation, without the making of any contract between the defendants and said Ord before that time, and that, in that event, said Horne would receive nothing. Mr. Horne stated that other parties were interested in the contract beside himself, with whom he would have to confer before he could consent to any modification of his contract. The plaintiffs asked him who the parties interested with him were, but he declined to state their names. He left the office of the plaintiffs agreeing to return on the Monday following.

On the first of August, 1881, the plaintiffs had another interview with said Horne at the office of the Chicago Belt Line R. R. Co., in which he stated that he was not yet ready to say what he would do in regard to the contract. On the 2nd of August, 1881, the plaintiffs had another interview with the said Horne at the office of said Belt Line Co., in which said Horne stated to the plaintiffs that he

wanted to confer in regard to the matter with Milton Weston, and, if possible, get Mr. Weston to hasten the completion of the trade, so that the first payment of $323,333.33 should be made on or before the 10th of September, 1881.

On the 3rd of September the plaintiffs had an interview with Milton Weston, in which they stated that Mr. Horne had informed them that he wished to confer with Mr. Weston in regard to his commission contract. Mr. Weston asked abruptly whether the plaintiffs thought he was interested in the Herne contract, to which the plaintiffs responded that they would accept his, Weston's, statement on that point. Mr. Weston then said that he was
128 not interested in the contract to any extent whatever. The plaintiffs stated to Mr. Weston that they desired to make such a contract between the defendants and Joseph P. Ord as Senator Barnum had agreed upon, but they would not do so so long as Horne insisted upon retaining a commission of five per cent. on the sale, and that if Mr. Horne should confer with him upon the subject he could so state to him. Mr. Horne entered the office, and the plaintiffs left him in conference with Mr. Weston.

On the 2nd or 3rd of August, 1881, either the son of the defendants, Oliver Forsyth, or the defendant, Jacob Forsyth, stated to the plaintiffs that the defendant, Caroline M. Forsyth, would be willing to allow Daniel H. Horne a commission of $10,000 in case the sale to said Ord, or his assigns, should be completed, and that she did not care to reduce the commission to Mr. Horne lower than that sum.

On the 3rd of August said Horne came to the office of the plaintiffs and had a conference there with the plaintiffs, and with the defendant, Jacob Forsyth. The plaintiffs offered, in lieu of the existing contract for commission, that the defendants would pay his $5,000 when the sale to said Ord should be completed. To this proposition said Horne objected strenuously, and addressed himself to the defendant, Jacob Forsyth, claiming that he should receive $25,000 in any event. Said defendant, Jacob Forsyth, stated to said Horne that the matter was left in the hands of the plaintiffs to adjust, and left the office of the plaintiffs. The plaintiffs thereupon conferred with said Horne, and shated that if a contract could be made that day they would agree that the defendants should pay to him the sum of one per cent. on the gross purchase price of the land, to be paid out of the first payment which should be made by said Ord,
129 or his assigns, in case of the completion of the sale either before, on, or after the 10th day of September, 1881, and that no subsequent extensions or modifications of the contract should affect the right of said Horne to receive the sum of one per cent. on the purchase price. Said Horne then and there agreed to accept the contract in such form, and thereupon the plaintiffs and said Horne drew up and formulated the following agreement:

PL'FFS' EX. 39.

"Whereas an agreement has been made and entered into, this 10th day of June, A. D. 1881, by and between Jacob Forsyth, and Caro-

line M. Forsyth, his wife, and Joseph P. Ord, of Princeton, New Jersey, giving to said Ord the right to purchase from said Caroline M. Forsyth eight thousand acres of land, more or less, in said agreement described, for the sum of one million of dollars: It is agreed by and between said Caroline M. Forsyth and Jacob Forsyth and Daniel H. Horne that if the sale contemplated in said agreement with said Ord shall be made to him or his assigns, and payment shall be made therefor, the said Jacob Forsyth and Caroline M. Forsyth will pay to said D. H. Horne, as compensation for his services in negotiating said contract for a sale, the sum of one per cent. on the gross amount of the purchase price of said land, in lieu of all other contracts or arrangements for commissions or compensation to said Horne, and the said amount of one per cent. is to be paid to said Horne in cash, out of the proceeds of the first cash payment provided in said agreement, excepting any sum or sums paid for forfeit money, or as a consideration for the option to purchase said lands.

"Chicago, June 10, 1881."

And thereupon one of the said plaintiffs, J. R. Doolittle, Jr., executed said contract in the names of Jacob Forsyth and Caroline M. Forsyth, and the said Horne executed the same.

130 Within a few days thereafter the defendants executed, in their own proper names, a copy of said contract, and the said Horne returned to the plaintiffs the said writing executed by said plaintiff, J. R. Doolittle, Jr., in the names of the defendants.

On the 30th of July, before the said plaintiffs had conferred with Daniel H. Horne in regard to the reduction of said commission, Clarke Forsyth, a son of the defendants, stated to the plaintiffs that the defendant, Jacob Forsyth, had requested him to say to the plaintiffs that if they should be able to secure a reduction in the Horne contract of $25,000, the plaintiffs should receive from the defendants the sum of $10,000. The plaintiffs stated to Clarke Forsyth that such compensation would be satisfactory, but that, at that time, they were unable to foretell what reduction, if any, could be obtained; that it might amount to $25,000, that it might be less, or that it might be more, and that, at that time, they could not make any definite arrangements about it, but would expect to be paid well for whatever they might accomplish.

The same day the plaintiffs met the defendant, Jacob Forsyth, at their office, and, referring to the conversation with Clarke Forsyth, stated to Jacob Forsyth that they were unable to tell what they could accomplish in the matter; that they might obtain a larger or a smaller reduction than $25,000; that they wanted to be paid according to the value of the services which they might render, and that they could not, at that time, make any definite arrangement about it. The plaintiffs stated to the defendant, Jacob Forsyth, that they were working in the interest of himself and his wife, that they would do the best they could, and that they wanted and expected to be paid liberally for whatever they should accomplish.

131 Upon the foregoing statement of facts assumed to be true,

what, in your opinion, would be a reasonable compensation for the services of the plaintiffs, in the drawing and negotiating with said Daniel H. Horne the contract for a commission of five per cent. as stated?

What, in your opinion, would be a reasonable compensation for the services of the plaintiffs, as stated, in securing a reduction of said commission contract, from five per cent. to one per cent. on a million of dollars, assuming that the result of such services was a saving to the defendants of the sum of $40,000?

132 Hypothetical statement No. 3 is as follows:

1.

Upon the following hypothetical statement of facts assumed to be true, to wit:

In the latter part of April or the early part of May, 1881, the plaintiffs were retained as attorneys and solicitors by the defendants to aid in the defence of a suit brought by Aquila Adams, Asaph Churchill, and Axel Dearborn, complainants, against the defendants and other parties to foreclose a trust deed, executed and delivered by the defendants to one John O. Pierson, dated Oct. 1st, 1875, to secure the payment of twenty eight promissory notes, made by the defendants, for the aggregate sum of $163,000, payable on the first of October, 1880, with ten per cent. interest after maturity. The defendants stated to the plaintiffs that the suit had originally been brought in the circuit court of Lake county, in the State of Indiana, and had been removed to the U. S. circuit court for the district of Indiana, and was then pending; that Messrs. McDonald & Butler, attorneys-at-law at Indianapolis, were the attorneys of record in the cause, but that a great deal of work in the case would have to be done at Chicago, and the plaintiffs were retained for the purpose of attending to it.

The defendant, Jacob Forsyth, stated to the plaintiffs that his engagements were such that he could not go to Indianapolis and spend the time necessary to state the case to Messrs. McDonald & Butler, and that it would be necessary to have the substance of the answer prepared in Chicago, and the plaintiffs were requested to draw up an exhaustive statement of the facts and points of the case, from which an answer could be prepared and filed. It was stated by the defendants to the plaintiffs that the object of answering the bill in said cause was twofold: First, to gain time and prevent a sale of the property until the defendants should be enabled to make a
133 a sale of the property covered by the mortgage; and, second, to defend the suit on the ground of usury.

The defendants had no copy of the bill which had been filed in the cause, and the plaintiffs requested them to procure it at the earliest possible moment.

The defendant, Jacob Forsyth, stated to the plaintiffs that he understood that one of the points in the case would be that the complainants would claim that the original contract of loan was not

made with the Continenal Life Insurance Co. of Hartford, but was made by Pierson, the trustee, either on his own behalf or for other parties, and stated to the plaintiffs that the notes, although made payable at the office of the Continental Life Insurance Co. in Connecticut, were not made payable to the company, but to the order of himself and his wife, and were endorsed by them in blank; and the plaintiffs were requested by the defendants to examine a number of papers, receipts, memoranda, and letters, purporting to have passed between the defendants and said Pierson, and between the defendants and the officers of said Continental Life Insurance Co., for the purpose of alleging in the answer and establishing by the proofs the fact that the transaction was in fact made between the defendants and said insurance co.

A delay of several days intervened before the plaintiffs were furnished with a copy of the bill filed in the circuit court of Lake county, during which interval they gave a careful and thorough investigation of the points suggested by the defendants, and advised the defendants that they could undoubtedly establish the fact that the transaction had occurred between them and the insurance co. The defendants stated to the plaintiffs that the original contract of loan was as follows:

"The Continental Life Insurance Co. was to loan to the defendants one hundred thousand dollars for a period of five years
134 without the payment of interest during that period, and, in consideration of such loan, the defendants gave their notes for one hundred and sixty-three thousand dollars, payable five years from their date, October 1st, 1875." The defendants stated that the notes for sixty-three thousand dollars were given to pay the interest on the loan of one hundred thousand dollars for five years, at the rate of ten per centum per annum, compounded annually. Also, that whereas the notes and deeds of trust of mortgage bore date on the first of October, 1875, they were not, in fact, executed or delivered until about the 30th of December, 1875, nearly three months after their date. Also that no part of the money represented by the notes had been advanced by the insurance co. to the defendants until after the execution and delivery of the notes and deed of trust. Also that the full amount of one hundred thousand dollars had not been paid by the company, and that the moneys which had been advanced had been paid from time to time, stretching over a period of several months. The defendants were requested by the plaintiffs to state, if they could, the exact amount and date of each payment which had been made to them, advising the defendants that, in answering the bill and alleging usury, it was very important to allege the exact facts in regard to the payment of the money; that the facts alleged in the answer should set forth substantially the account between the parties, and with such precision as not to require an amendment of the answer; that courts did not look with favor upon the defense of usury; and that if the defendants should be required to ask the favor of the court in amending the pleadings, they might be required, as a condition to the granting of such amendment, to

tender the actual amount received, with lawful interest. The defendants were unable to furnish an exact statement of the amounts and dates of the payments which had been made to them
135 by said insurance co., but furnished to the plaintiffs a memorandum in the handwriting of the defendant, Jacob Forsyth, and stated that it had been submitted to the defendant Pierson, and had been accepted by him as correct, before the last of the money advanced to them had been paid. The plaintiffs were informed by the defendants that the defendants had had a final accounting with said trustee, John O. Pierson, in May or June, 1876, and had given a receipt to said Pierson for the sum of one hundred thousand dollars, although the full amount had not been received by the defendants.

The plaintiffs received from the defendants a partial copy of the bill filed in the circuit court of Lake county, Indiana, and, on inspecting the same, notified the defendants that the complainants themselves alleged in the bill that the contract of loan was made with the Continental Life Insurance Co., and that no issue need be made on that subject. The copy of said bill is as follows:

PL'FFS' EX. 22.

Foreclosure of Mortgage.

STATE OF INDIANA, *Lake County*, } ss:

In the Lake Circuit Court, November Term, 1880.

AQUILA ADAMS, AXEL DEARBORN, ASAPH CHURCHILL, & JOHN O. ADAMS, Trustee,
versus
CAROLINE M. FORSYTH, JACOB FORSYTH, and Others.

The plaintiffs above named complain of the defendants above named and say that heretofore, to wit, on the first day of October, 1875, the defendant, Caroline M. Forsyth, was the owner in fee-
136 simple of all the lands described in the annexed mortgage; that on said day, being such owner, the said Caroline, with the defendant, Jacob Forsyth, who was then and is now the husband of the said Caroline, duly executed a mortgage conveying to the said John O. Pierson, as trustee, for the benefit of the holders of the notes hereinafter set forth and as security for the payment of said notes and of the indebtedness evidenced by said notes, the lands in said mortgage described; that a true copy of said mortgage and true copies of said notes are filed herewith and marked respectively Exhibits 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, and 29 and 30; that the said notes, as well as the said indebtedness thereby evidenced, are all due and remain wholly unpaid.

That there is due the plaintiffs upon said notes the sum of one hundred and seventy-five thousand dollars, all of which remains wholly unpaid.

That the said notes, after being so signed by the said Caroline and Jacob, were by them endorsed in writing, copies of which endorsements appear on the said exhibits and are likewise filed herewith and made a part hereof. That, after being so signed and endorsed, the said notes were by the said Caroline and Jacob delivered to the Continental Life Insurance Company, a corporation duly organized under and by virtue of the laws of the State of Connecticut.

That afterwards, to wit, on the — day of ——, and before the commencement of this suit and before the maturity of said notes, the said Life Insurance Company duly sold, transferred, and assigned said notes to the plaintiffs, the said Aquila Adams, Axel Dearborn, and Asaph Churchill, who are now the owners of said notes and who so purchased the same in good faith and for a valuable
137 consideration. That the said mortgage, on the 31st day of December, 1875, was duly recorded in the recorder's office of Lake county, Indiana, in mortgage record book 7, on pages 493 to 500, both inclusive, where the record thereof yet remains, and a copy of said record is filed herewith and made a part hereof, marked Exhibit (2). That all the other persons named as defendants herein, except the said Forsyths, are asserting some claim upon or interest in said land, the exact nature of which plaintiffs do not know, but plaintiffs allege that all the interest and claim of said defendants are subsequent and subject to plaintiffs' rights under said mortgage.

Wherefore plaintiffs ask judgment for the sum of two hundred thousand dollars and the foreclosure of said mortgage and sale of said property or so much thereof as may be necessary to pay the said indebtedness, and for all other proper relief.

WM. H. SWIFT &
J. W. YOUCHE,
Attorneys for Plaintiffs.

The plaintiffs advised the defendants that they would allege usury upon the following grounds: First. That in the original contract itself, which provided for the payment of $63,000 for a loan of $100,000 for five years, a higher rate of interest was reserved than could be contracted for under the laws of Illinois. Second. That the notes was antedated nearly three months before the execution and delivery, and before any part of the money had been advanced by the insurance company upon them, and thus provided for the payment of interest for a longer period than the existence of the loan. Third. That the money when advanced was advanced in parcels and not as an entirety, and without any rebate or allowance of interest for the periods intervening between the date of the notes, October 1st, 1875, and the times of the various payments of money.
138 Fourth. That the sum of $100,000 was not loaned, in fact, and that when the defendants receipted in full for that sum, having received a less amount, the notes were, for this reason, tainted with usury in the hands of the Continental Life Insurance Company.

The defendants also stated to the plaintiffs that after the execution

and delivery of the twenty-eight notes referred to they had, at the request of said Pierson, executed another set of notes for the same amount, but bearing interest from date, instead of after maturity, and had delivered such additional notes to said Pierson, under a contract with him that they should be returned to the defendants without cost to them. The defendants further stated that said additional notes had, in fact, been returned to them by the said Pierson, but that before they were so returned the transaction had attracted the attention of the Legislature of Connecticut, and that a report had been made in regard to the affair by some insurance commissioners of that State, and the defendants presented to the plaintiffs and called to their attention a printed report containing, among other things, as follows:

"In September, 1875, the Continental Company made a loan to Caroline M. and Jacob Forsythe, of Sheffield, Lake county, Indiana, of $100,000 for five years upon 7,750 acres of land situated in said Lake county, about fifteen miles from Chicago. The interest upon said loan, at the rate of ten per cent. per annum, was compounded for the full term of the loan and added to the principal, making about $163,000. On the first of January, 1876, Jacob Forsythe, for his wife and himself, delivered to the insurance company, at its office in Chicago, five notes for $10,000 each, twenty-two notes for $5,000 each, and one note for $3,000, making $163,000, all said notes being dated October 1st, 1875, and payable five years from date,
139 without interest. The mortgage of same date was delivered with the notes. On January 27th, 1876, Mr. Forsythe was invited to come to the company's office in Chicago, and was then and there requested by the company, through its secretary, to make a new set of notes for the same amount as those already delivered, but bearing interest, to supersede the old notes temporarily. It was then agreed upon the part of Mr. Forsythe to furnish the duplicate notes, as requested, and that the original notes remain in the possession of the company. The interest-bearing notes for $163,000, signed by Caroline M. and Jacob Forsythe, were delivered to the company, at its office in Chicago, January 29th, 1876, for which notes Mr. Forsythe took the company's receipt by its agent in Chicago. Both sets of notes were in November last in possession of the company, and were examined by us, the originals — in the company's office in Hartford, and the duplicates, written as bearing interest, in its office in Chicago. Our appraisers in Chicago valued the 7,750 acres of land, at an average price of $20 per acre, $155,000."

The defendants suggested to the plaintiffs that perhaps the transaction between the defendants and said Pierson in regard to the said additional notes might form a ground upon which they could defeat the mortgage on said lands; that perhaps the giving of the additional notes might operate as a payment of the original notes, and that when the additional notes were returned and canceled the debt and the mortgage securing the same would be discharged. The plaintiffs advised the defendants that, in their opinion, no such view would be sustained by the court; that the additional notes were not, in fact, given by the defendants or received by the insurance com-

pany as a discharge of the original notes; that, as betweeen the parties, the giving of those notes could not be treated
140 as the payment of the debt; that, at most, the effect of the transaction was merely to enable the insurance company to misrepresent its actual securities, and thus impose upon the public that the defendants had in no way been injured; and, furthermore, that having participated in the act by giving the additional set of notes, the defendants were not in a position to derive any advantage from it.

The plaintiffs framed a long statement and the same was forwarded to Messrs. McDonald & Butler before the first day of June, 1881.

On the 1st day of June, 1881, the defendant, Jacob Forsyth, called at the office of the plaintiffs and addressed the following note to one of said plaintiffs:

PL'FFS' EX. 24.

CHICAGO, ILL., *June 1st*, 1881.

MY DEAR SIR: I am so circumstanced, owing to the various negotiations for the sale of that property, that I cannot leave here for an hour; consequently I am unable to go to Indianapolis to see McDonald & Butler, to whom I have sent now three or four letters, without getting any reply. This renders me uneasy and disturbed. Therefore, I want you to take a few minutes this evening before you go home to write them by mail, stating that you feel interested in me and are aware of all the facts for the defence, having drawn up, in a rough way, the statement sent them, embodying the facts for the defence, and enable them to draw up the answer, if that was necessary for next Monday, the 6th of June, and state to them how I am situated with regard to the sale as already stated, and request them to let you know, on receipt of your letter, how the matter stands, both by telegraph and mail.

I have important information, which I would be glad to tell
141 you, bearing on compromise and also about the sale. A new competitor for the purchase of the land is now to the front.

Yours, truly, JACOB FORSYTH.

Dunlap wants it; Jay Gould furnishes him the money, and he is in the city to-day. Dunlap's road will, therefore, be built. This property is required.

After the first of June the defendants informed the plaintiffs that an amended bill had been filed in said cause in the U. S. circuit court for the district of Indiana, and, thereupon, the plaintiffs gave to said amended bill an examination.

Expecting that McDonald & Butler would frame the answer and file it, they addressed a letter to those gentlemen, at the request of the defendants, stating their views, as follows:

PL'FFS' EX. 25.

JUNE 3RD, 1881.

GENTLEMEN: At the request of Mr. Jacob Forsyth, having before

me a partial copy of the original bill of complaint filed in the Lake county court, I prepared in the rough a draft of an answer.

I had not seen the amended bill until after such draft was forwarded to you.

On a hasty reading of the amended bill I see that it contains certain matters not touched upon in the draft.

First, in regard to the claim for attorney's fees and solicitor's fees in the foreclosure of the mortgage.

I do not believe that the attorney's fee can be charged up, because no judgment has been entered up on the notes. As to the solicitor's fee of ten per cent. on the amount to be found due on the mortgage in the foreclosure suit, I am not able to state at
142 present whether that can or cannot be collected. I should think, however, the court in equity, in a case of this character, would place some limit on a contract to pay for services to be rendered before it, and would only allow as solicitor's fees a sum bearing a reasonable relation to the value of the services performed. Suppose the mortgage provided for a solicitor's fee of seventy-five per cent. of the amount due, a mortgage is a security for a debt, but I do not think it can contain lawfully provisions intended merely to indemnify the mortgagee against the costs and expense of collection of such unconscionable severity as to work a confiscation of the estate mortgaged.

Second. The allegation of complainants that they paid taxes in two separate amounts.

I think that those payments are a proper charge, with the interest at the rate provided in the mortgage from the time of payment; at least that would be the rule in Illinois.

In the defendant's offer to pay the sum due, the taxes and interest should be included in the offer.

Third. The amended bill refers to the Continental Life Insurance Co. as the remote assignors of the complainants. I presume they intend to show that the complainants did not purchase directly from the insurance co., and thus render it more difficult for the Forsyths to prove against complainants' notice of the usurious character of the loan. But I think notice can be brought home to the complainants. The circumstances point strongly in that direction.

The complainants did not examine the title; the notes provided for no interest until after maturity; the large amount involved in the transaction, and the fact that Mr. and Mrs. Forsyth have no means of payment except the land itself, stamp the transaction as an exceedingly unusual one.

The transfer of the notes to the complainants may have
143 been as collateral security and not an absolute sale.

I understand the rule to be than when an assignee goes into equity to enforce a lien he has the same and no greater right than the creditor who made the contract. If that is so the defence of usury will cut down the decree to the actual amount due.

But in case the Forsyths fail to prove notice against the complainants of the usurious transaction, may not the notes in the hands of

the complainants as innocent purchasers be good for their face as a legal demand and, after having proved up the amount chargeable against the land as a security, may they not sue at law for the difference, obtain judgment against Mrs. Forsyth, and sell her equity of redemption on the judgment?

The notes were made, *i. e.*, dated, in Illinois, where a married woman could lawfully contract debts at the time, Oct. 1, 1875. I think, also, that Mrs. Forsyth actually signed the notes in this city; but she was a citizen of Indiana at the time.

Whether the fact of her citizenship would have any effect on the validity of the notes I am not prepared to say, but am disposed to doubt it.

I shall be happy to aid you in any way in my power in this case. Mr. Forsyth has been very much engaged here in making arrangements for the sale of the property, and hopes to do so on a favorable basis.

Yours very truly, J. R. DOOLITTLE, JR.

Messrs. McDonald & Butler, att'ys at law, Indianapolis."

About the 3rd of June the defendants brought to the plain-
144 tiffs the statement which they had prepared for the drawing of the answer, and requested to put the answer in form ready for filing. On the 4th of June the plaintiffs telegraphed McDonald & Butler as follows:

"Please return amended bill Forsyth case; obtain leave to answer; by next Saturday will complete answer and forward you."

On the 4th of June Messrs. McDonald & Butler wrote as follows:

PL'FFS' EX. 26.

INDIANAPOLIS, IND., *June* 4, 1881.

J. R. Doolittle, Jr., 184 Dearborn St., Chicago:

Your favor of the 3rd and telegram of the 4th received. Enclosed please find copy of amended bill, as requested.

We think your suggestion as to attorney's fees are correct. With the additions to the draft of the answer already made, which will cover the subject of attorney's fees, we think the answer will be very complete.

We think we can get till Saturday for answer, but would like to receive it sooner if possible.

Yours truly, McDONALD & BUTLER.

Said amended bill alleged, among other things, as follows:

IN PL'FFS' EX. 23.

Your orators herein, humbly complaining, show unto this honorable court, by this their amended bill of complaint, that your said orator, John O. Pierson, trustee, &c., is a resident and citizen of the State of Illinois; that your orators, Aquilla Adams, Axel Dearborn, and Asaph Churchill, are residents and citizens of the State of Massachusetts.

That the respondents herein, Caroline M. Forsyth and Jacob
145 Forsyth, are residents and citizens of the county of Lake, in the State of Indiana; that the respondents Edward A. Shedd, Charles B. Shedd, and Henry J. Edwards are residents and citizens of the county of Cook, in the State of Illinois; that the respondent Harriet S. Clarke is a resident and citizen of the State of Wisconsin.

That the respondents herein, John Lawson, John F. Law, Ferdinand Schmidt, Sophia Schmidt, Carl Schwarz, Rena Schwarz, Hans Kunser, Caroline Kunser, Claus Clausen, Henry Obernaur, Mana Eugleking, Frederick Eugleking, Daniel W. Hewitt, Mary M. Hewitt, William E. Judd, Ellen H. Judd, John Petherick, John Studdy Leigh and —— Leigh, his wife, (and others associated with said John Studdy Leigh, their names being unknown to these complainants, said parties unknown claiming jointly with said Leigh, or in some mode an interest through or with him in said premises, and their names having been concealed from these defendants,) are each and all of them non-residents of the State of Indiana, and non-residents of each of the States of Indiana and Illinois, but residing somewhere in the United States, which respective residents are unknown to these complainants.

And your orators further show that on the first day of October, A. D. 1875, said respondents, Caroline M. Forsyth and Jacob Forsyth, in consideration of the sum of one hundred and sixty-three thousand ($163,000) dollars of money actually loaned at that date by the Continental Life Insurance Company, the remote assignors of these complainants herein, to said Caroline M. Forsyth and Jacob Forsyth, they, said respondents, Forsyth and Forsyth, executed and delivered to said Continental Life Insurance Company to secure said sums as named therein, being a part of the said sum loaned, five certain negotiable promissory notes for the sum of ten thousand dollars each, making
in the aggregate the sum of fifty thousand dollars ($50,000.00),
146 also duly executed as a part of each of said notes, the written contracts attached thereto, which said five promissory notes, together with the said contracts attached thereto, are hereunto annexed by true copies and hereby made a part of this bill of complaint, in like manner as if written out at full length herein, and for certainty are marked respectively Exhibit "3," Exhibit "4," Exhibit "5," Exhibit "6," Exhibit "7," each of said exhibits is to be deemed to include as a part thereof the writing attached thereto and forming a part of said respective contracts, providing that on each note the sum of two hundred and fifty dollars ($250.00) shall be added in the judgment taken thereon, as attorney's fees, making in the aggregate the sum of twelve hundred and fifty dollars ($1,250.00) attorney's fees.

Also said respondent-, Caroline M. Forsyth and Jacob Forsyth, executed and delivered and delivered at said date, to your said orators, remote assignors, the Continental Life Insurance Company, twenty-two certain other negotiable promissory notes, together with certain contracts in writing attached to each of same as a part thereof, in and by each of which said notes said respondents promised to

pay the sum of five thousand dollars, ($5,000.00) making in the aggregate the sum of one hundred and ten thousand dollars, ($110,000.00); also by virtue of the writing duly executed and attached thereto, as a part thereof, stipulated that the sum of one hundred and fifty dollars ($150.00), as attorney's fees, should be added to the judgment taken upon each of said notes, making in the aggregate the sum of thirty-three hundred dollars ($3,300.00), as attorney's fees upon said notes; that each of said notes, together with the contracts attached thereto, making a part thereof, are hereby made parts of this bill of complaint by copies filed herewith, in like manner as if written out in full herein, and for more certainty
147 are respectively marked Exhibits "8," Exhibit "9," Exhibit "10," Exhibit "11," Exhibit "12," Exhibit "13," Exhibit "14," Exhibit "15," Exhibit "16," Exhibit "17," Exhibit "18," Exhibit "19," Exhibit "20," Exhibit "21," Exhibit "22," Exhibit "23," Exhibit "24," Exhibit "25," Exhibit "26," Exhibit "27," Exhibit "28," Exhibit "29."

Also said respondents, Caroline M. Forsyth and Jacob Forsyth, at said date, executed and delivered to your said orators, remote assignors, the Continental Life Insurance Company, one certain other negotiable promissory note for the sum of three thousand dollars, and also a contract in writing attached thereto, forming a part thereof, providing that the sum of one hundred dollars ($100.00), should be added to the judgment taken on said note, as attorney's fees; that by said last note said respondents promised to pay the said sum of three thousand dollars as therein nominated; that said note and contract thereto attached are hereby made a part of this bill of complaint in like manner as if written out herein in full length, by copy filed herewith, and for certainty is marked Exhibit "30."

That by the aforesaid notes and written contracts thereto attached these respondents, Caroline M. Forsyth —, undertook and agreed to pay the several sums therein named and secured thereby, amounting in the aggregate to the said sum of one hundred and sixty-three thousand dollars ($163,000.00), with the sum of forty-six hundred and fifty dollars as attorney's fees; that the same was by the tenor and effect of said several instruments to be paid five years from date of said notes, together with ten per centum interest per annum after the maturity thereof; that each and all of said notes became due and payable October 1st, 1880; that no part of said sum was paid, but remains due and wholly unpaid.

That it was further stipulated in said notes that said sum should be paid without relief from valuation and appraisement laws.
148 That by the terms of said notes said sum was to be paid at the home office of the Continental Life Insurance Company of Hartford, Connecticut.

That said notes and contracts thereto attached and the mortgage hereinafter mentioned, all bearing even dates of the 1st day of October, 1875, as aforesaid, and maturing on the 1st day of October, 1880, as aforesaid, were made, executed, and delivered, and the contract of loan of said money secured and evidenced thereby, was made and executed and to be in all things performed at the city of Chi-

cago, in the State of Illinois, and that under and by virtue of the law of the place of said contract duly governing the same it was lawful and binding upon said promissors to obligate and stipulate, as was done as a part of said contracts, that the sum of four thousand six hundred and fifty dollars ($4,650.00) should be added to the sum of principal and interest as attorney's fees, and that same should be included in the judgment with said sum of principal and interest.

That said respondents, Caroline M. Forsyth and Jacob Forsyth, executed each of said notes and made each payable for value received to "ourselves," and each of said makers endorsed upon the back of each note her and his respective names as assignors, in blank, as appears upon the copies herewith as aforesaid.

That your orators, Aquila Adams, Axel Dearborn, and Asaph Churchill, are the legal owners and holders of said obligations, and were such long prior to the maturity of said notes and each of them, by purchase, for a full and valuable consideration of the prior legal holders and owners thereof.

And your orators further show that on the first day of October, A. D. 1875, the said respondents, Caroline M. Forsyth and Jacob Forsyth, as collateral security for the payment of said sum of one
149 hundred and sixty-three thousand dollars ($163,000.00), with interest and attorney's fees as aforesaid, executed and delivered at the same time said notes and writings were executed and delivered and as a part of the same contract made at the city of Chicago, in the State of Illinois, a certain mortgage, with covenants of warranty, whereby they granted, bargained, and sold to your orator, John C. Pierson, as trustee for the legal holders of said notes and instruments, the following-described real estate, with the appurtenances thereto belonging, situated and lying in the county of Lake and State of Indiana, to wit:

(Descriptions omitted.)

And your orators further show that by the conditions of said mortgage all sums stipulated to be paid by said notes and writings and secured by said mortgage were to be paid without relief from valuation or appraisement laws; that each and every of said notes should bear interest at the rate of ten per centum per annum from the maturity thereof, October 1st, 1880, until paid; that it is further provided by said mortgage "that if this mortgage should be foreclosed by suit the plaintiff shall be entitled to have allowed as attorney's or solicitor's fees a sum equal to ten per cent. of the amount of indebtedness secured hereby and the remaining unpaid principal and interest, which sum shall form a part of the judgment which shall be rendered in such foreclosure in like manner as if it formed a part of the original indebtedness secured hereby;" that the said sum to be paid as solicitor's fees is, in addition to the provision made for attorney's fees, in the writings annexed to each of the notes as aforesaid.

And your orators further show that it was stipulated and provided in said mortgage that the said respondents, Caroline M.
150 Forsyth and Jacob Forsyth, "shall at all times keep the taxes

and assessments of any and all kinds that may become liens upon said mortgaged premises fully paid and satisfied, and that in case said respondents should fail to pay the taxes upon the above mortgaged premises as herein provided, then it shall be at the option of your orators" to "pay same and charge it upon said premises, and the said sum or sums thus paid shall be subject to all the conditions of this mortgage, and shall bear the rate of ten per centum per annum interest from the date of the paymentof each of said sums, and the judgment of foreclosure herein shall cover the same in like manner as the principal sum hereby secured." That said respondents failed to pay the taxes upon said premises, and said taxes had accrued and accumulated and were a lien thereon on the 6th day of February, 1880, in the sum and the amount of one thousand three hundred and ninety-seven dollars and sixty-two cents ($1,397.62). That upon said day your orators herein, in the due exercise of their right under said mortgage and agreement, did elect to and did pay the treasurer of Lake county, Indiana, in discharge of said taxes upon said premises, the said sum of one thousand three hundred and ninety-seven dollars and sixty-two cents ($1,397.62), and charged same upon this said mortgage as stipulated therein. Also said respondents further failed, in violation of their agreement, to pay the taxes that were a lien upon said premises, and there had, on the 11th day of February, 1881, accrued and accumulated, and were a lien upon said premises, taxes in the sum of one thousand four hundred and twenty-five dollars and forty cents ($1,425.40). That on said day your orators, in the due exercise of their rights under said contract, elected to and did pay said taxes on said day to the treasurer of Lake county, Indiana, in discharge of the lien thereof, in the sum of one thousand
151 four hundred and twenty-five dollars and forty cents ($1,425.40), and charged the same upon this said mortgage, as stipulated therein; that said sums thus paid for taxes upon said premises are due and owing from said respondents herein to these complainants, together with ten per centum interest per annum from the date of such payments.

That it is further stipulated by said mortgage that any judgment taken for any sum due by virtue of said notes, writings, or said mortgage should bear ten per centum interest as liquidated damages until fully paid.

That said mortgage contains other material stipulations and agreements, as more fully appears by reference to said mortgage, which is to be taken and deemed as written out in full, and each stipulation and agreement therein specifically and fully declared upon herein, and no right of proof or recovery is to be omitted because same are not recited in this bill and declared upon specifically, in addition to the same appearing in the copy of said mortgage marked Exhibit "2," and made a part thereof.

Your orators further show that the respondent-, Harriet S. Clark, John Lawson, John F. Law, Ferdinand Schmidt, Sophia Schmidt, Carl Schwarz, Rena Schwarz, Hans Kunser, Caroline Kunser, Claus Claussen, Henry Obernaur, Maria Eugleking, Frederick Eugleking, Edward A. Shedd, Charles B. Shedd, Daniel W. Hewitt, Mary M. Hewitt, Will-

iam E. Judd, Ellen H. Judd, Henry J. Edwards, and John Petherick, and John Studdy Leigh and —— Leigh, his wife, and all others associated with him, said John Studdy Leigh, their names being concealed from and unknown to plaintiffs, claim to have some right or interest in or claim to said mortgaged premises, the nature and interest of which is unknown to your orators, and your orators aver that if any of said parties have any claim in any manner to
152 said mortgaged premises, or any part thereof, such claim or claims are junior and subsequent to the mortgage of your orators herein.

And your orators further show that there is now due to your orators upon the notes, writings, agreements, and mortgage herein sued upon the said sum of one hundred and sixty-three thousand dollars, as stipulated in said note, with interest thereon at ten per centum from the 1st day of October, 1880. Also that there is due your orators upon the contracts and writings and agreements attached to said notes the further sum of four thousand six hundred and fifty dollars as attorney's fees, as therein agreed, also the sums above set out and paid on account of tax liens, with ten per centum per annum interest thereon from date of payment. Also that there is due your orators the further sum of solicitor's fees as provided and agreed in said mortgage, the sum thus due to be ascertained at date of decree by computing ten per centum upon the gross amount of principal and interest due upon said notes and of taxes paid and interest thereon at date of decree, all of which is unpaid.

Your orators further show that no proceedings have been had at law or otherwise for the recovery of said sums, or any part thereof.

Wherefore your orators humbly pray this honorable court that by a decree fully entered herein the said respondents, Caroline M. Forsyth, Jacob Forsyth, Harriet S. Clarke, John Lawson, John F. Law, Ferdinand Schmidt, Sophia Schmidt, Carl Schwarz, Rena Schwarz, Hans Kunser, Caroline Kunser, Claus Clausen, Henry Obernaur, Maria Eugleking, Frederick Eugleking, Edward A. Shedd, Charles B. Shedd, Daniel W. Hewitt, Mary M. Hewitt, William E. Judd, Ellen H. Judd, Henry J. Edwards, John Petherick, John Studdy Leigh, — Leigh, his wife, and others associated with said John Studdy Leigh, their names being concealed from and unknown to
153 plaintiffs, and all persons claiming by, through, or under them, or either of them, may be barred and forever foreclosed of all right, title, claim, lien, and equity of redemption to, upon, or in said mortgaged premises, or any part thereof; that said mortgaged premises may be declared to be sold according to law and the practice of this court; that out of the proceeds of such sale your orators may be paid the several sums due upon said notes, agreements, and instruments of writing, and said mortgage, with interest thereon at the rate of ten per centum per annum, computed to the day of such payment, together with the attorney's and solicitor's fees, also the sum paid in discharge of tax liens, as stipulated and agreed upon, as above herein declared and set forth, and the costs and expenses of this suit so far as the amount of such moneys properly applicable thereto will pay the same, and that said respondents, Caroline M.

Forsyth and Jacob Forsyth, may be adjudged to pay any deficiency which may remain after applying all of said money so applicable thereto, and that your orators may have such other and further relief in the premises as shall be agreeable to equity and good conscience.

The plaintiffs had several interviews with the defendant, Jacob Forsyth, in regard to the framing of the answer.

The defendants were not able to tender to the complainants in said foreclosure suit the amount actually due. They were unable, for that reason, to file a cross-bill demanding affirmative relief. Said defendant, Jacob Forsyth, informed the plaintiff that he had been discharged in bankruptcy, and requested them to set up his bankruptcy and discharge in the answer. The plaintiffs thereupon prepared the following answer:

154 IN PL'FFS' EX. 11.

Bill.

In the Circuit Court of the United States for the District of Indiana.
In Chancery.

AQUILA ADAMS, AXEL DEARBORN, ASAPH CHURCHILL, & JOHN O. PIERSON, Trustee, etc., Complainants,

vs.

CAROLINE M. FORSYTH and JACOB FORSYTH, Impleaded with Harriet S. Clarke and others, Defendants.

The joint and separate answers of Caroline M. Forsyth and Jacob Forsyth, two of the defendants, to the amended bill of complaint lately filed in said court against them and other persons by Aquila Adams, Axel Dearborn, Asaph Churchill, and John O. Pierson, trustee, etc., complainants:

These defendants, saving and reserving to themselves all and all manner of benefit and advantage of exception to the errors and imperfections in said complainants' amended bill of complaint contained, for answer thereto or unto so much or such parts thereof as these defendants are advised is material for them to make answer unto, answering, say:

155 They admit that on or about the first day of October, A. D. 1875, the said Caroline M. Forsyth was the owner in fee of the said several parcels of land mentioned and described in the complainants' said amended bill; and these defendants also admit the making, execution, and delivery of the said trust deed to said John O. Pierson, trustee, bearing date the first day of October, A. D. 1875, but aver that in fact said deed of trust was not executed and delivered at said date, but, on the contrary, the same was not executed or delivered until or about the 30th day of December next thereafter, or nearly three months after the same bears date.

These defendants, further answering, admit that said trust deed was given to secure the payment of twenty-eight promissory notes bearing date October first, A. D. 1875, and payable in five years

from date without interest, with interest at the rate of ten per centum per annum after maturity at the home office of the Continental Life Insurance Company, of Hartford, Connecticut; they aver that said notes were made, executed, and delivered on or about the 30th day of December, A. D. 1875, and admit that said twenty-eight notes were executed by these defendants, payable to their own order, and were endorsed by them, and delivered by these defendants to the said Continental Life Insurance Company; but as to the allegation in said bill that true copies of said notes are annexed thereto these defendants are unable to state and therefore do not admit the said allegation to be true, but require strict proof thereof as the complaints shall be advised.

Further answering these defendants admit that said notes to the number of twenty-two were for the sum of five thousand dollars each; that five others of said notes were for the sum of ten thousand dollars each, and that one other of said notes was for the sum of three thousand dollars, making in the aggregate the sum total of one hundred and sixty-three thousand dollars as the face
156 of said notes; but these defendants deny that the sum of one hundred and sixty-three thousand dollars was actually loaned to these defendants by said Continental Life Insurance Company on the 1st day of October, A. D. 1875, or at any other time before or since.

These defendants, further answering, allege that the complainants herein ought not to have and recover from these defendants, or either of them, and ought not to claim or have a lien upon said mortgaged premises in the said sum of one hundred and sixty-three thousand dollars, and interest thereon at the rate of ten per centum per annum from and after the first day of October, A. D. 1880; and in this behalf these defendants aver that in the summer of A. D. 1875 they applied to the proper financial agent of the said Continental Life Insurance Company at Chicago for a loan of money on the notes of these defendants, to be secured by mortgage or trust deed of the lands mentioned in said amended bill of complaint, and were referred to the secretary of said company, who was at the time at the city of Chicago, Illinois; that said secretary referred these defendants to said complainant, John O. Pierson, who had recently been appointed by said company as its local financial agent or loan agent at said city of Chicago; that these defendants thereupon applied to said Continental Life Insurance Company, through said Pierson, for a loan of one hundred thousand dollars for a period of five years, and at the rate of ten per centum per annum interest, said principal and interest to be paid at the end of said period of five years; and these defendants allege that if the loan had, in fact, been so made it would have made the sum to be paid by these defendants, at the expiration of five years, the duration of the loan, the sum of one hundred and fifty thousand dollars and no more.

But these defendants allege that the said Continental Life
157 Insurance Company refused to make the loan upon said terms, and insisted that these defendants should pay a larger sum of money, for the use of said one hundred thousand dollars for

five years, than interest at the rate of ten per centum per annum on said sum, which was the highest rate of interest which could be contracted for in the State of Illinois by the laws thereof.

And these defendants allege that the said Continental Life Insurance Company, acting by and through the said complainant, Pierson, at Chicago, in the State of Illinois, proposed to these defendants that the said company would loan to these defendants the sum of one hundred thousand dollars for the period of five years for the sum of sixty-three thousand dollars, payable at the end of said five years, the same being thirteen thousand dollars more than the highest rate of interest allowed by the laws of Illinois would produce as interest on the said sum of one hundred thousand dollars for the period of five years, the said Continental Life Insurance Company then and there intending to exact and receive from these defendants unlawful and usurious interest on said loan, forbidden by and contrary to the laws of said State of Illinois.

And these defendants thereafter, on or about the 5th day of October, A. D. 1875, at the city of Chicago, in said State of Illinois, accepted said proposition of the said company, and agreed to take said loan of one hundred thousand dollars for the period of five years, and to pay as interest thereon, for the use thereof, the sum of sixty-three thousand dollars at the end of said period.

And these defendants allege that the said notes and trust deed were made, executed, and delivered in pursuance of said contract of loan, and for no other purpose and upon no other consideration.

And these defendants allege that said contract was usurious in its inception, and unlawful by its terms, under the statutes of
158 said State of Illinois, where it was entered into.

And these defendants further allege that they executed the said promissory notes for the sum of one hundred and sixty-three thousand dollars some time in the latter part of December, A. D. 1875, but the said insurance company, acting by and through the said complainant, John O. Pierson, insisted and demanded of these defendants that the said notes should be dated back to the first day of October, A. D. 1875, although the said insurance company well knew that none of the money intended to be loaned had on the first day of October, 1875, been received by these defendants, or had been paid out by said company.

And in this behalf these defendants allege that in fact they did not deliver said notes until about the first day of January, A. D. 1876, and that until the delivery of said notes no part of said loan was advanced or paid by said company to these defendants, but that from and after the delivery of said notes as aforesaid, up to and including the 13th day of January, A. D. 1876, the sum of seventy-two thousand five hundred dollars was advanced by said company upon said notes to these defendants.

And these defendants further allege that the remainder of said loan, to wit, the sum of twenty-seven thousand five hundred dollars, was never fully paid to these defendants by the said company.

But these defendants admit that on or about the 29th day of January, 1876, the said company advanced to them the further sum of

one hundred dollars; and on or about February 3rd, A. D. 1876, the further sum of one thousand dollars; and on or about February 28th, A. D. 1876, the further sum of fifteen hundred dollars; and on or about March 8th, A. D. 1876, the further sum of one thousand [and] three and fifty hundredths dollars; and on or about March 16th, A. D. 1876, the further sum of five hundred dollars; and on or about March 17th, A. D. 1876, the further sum of five hundred dollars; and on or about March 27th, 1876, the further sum of five hundred dollars; and on or about March 29th, A. D. 1876, the further sum of fourteen hundred twenty-one and sixty-three hundredths dollars; and on or about April 6th, A. D. 1876, the further sum of one hundred dollars; and on or about April 10th, A. D. 1876, the further sum of five hundred dollars; and on or about the 15th day of April, A. D. 1876, the further sum of one hundred [and] nine and fifty-two hundredths dollars; and on or about April 20th, A. D. 1876, the further sum of six hundred dollars; and on or about April 22nd, A. D. 1876, the further sum of three hundred dollars; and on or about April 25th, A. D. 1876, the further sum of five hundred dollars; and on or about April 29th, A. D. 1876, the further sum of fourteen hundred dollars; and on or about May 9th, A. D. 1876, the further sum of five hundred dollars; and on or about May 11th, A. D. 1876, the further sum of five thousand dollars; and on or about May 16th, A. D. 1876, the further sum of one thousand dollars; and on or about the 16th day of May, A. D. 1876, the further sum of eight thousand four hundred sixty-five and thirty-five hundredths dollars, making a total sum of twenty-five thousand dollars so advanced by said Continental Life Insurance Company to these defendants upon said notes after the said 13th day of January, A. D. 1876, and together with the sums so advanced by said company before said 13th day of January, A. D. 1876, making a total of ninety-seven thousand five hundred dollars.

And these defendants aver that the said sums of money so advanced at the times above specified, and aggregating said sum of ninety-seven thousand five hundred dollars, are all the money advanced or paid by the said Continental Life Insurance Company on the said notes, and they allege that the said company did not in fact pay out to or for these defendants, at one time or collectively, at such different times, the gross sum of one hundred thousand dollars, which said company had agreed as aforesaid to loan to these defendants.

And these defendants, further answering, allege that although the said notes so made and delivered by these defendants bore date on the first day of October, 1875, no rebate of interest or credit of any kind was allowed by said company on said notes, because of its failure to pay the sum of one hundred thousand dollars to these defendants at said date last mentioned, nor was any interest allowed to these defendants upon the various sums of money advanced from time to time, as above set forth, from said first day of October, A. D. 1875, up to the dates when they were respectively paid.

And these defendants, further answering, allege that the said company refused to allow such compensatory interest upon such deferred

payments of said principal loan for the unlawful purpose of exacting and receiving from these defendants interest upon said various sums of money for such respective periods of time from the first day of October, A. D. 1875, up to the dates of such respective payments, when in fact the said sums of money had not been loaned, but were in fact in the hands of said company, and not in the hands of these defendants, and thus upon such respective sums to exact and receive from these defendants interest in excess of the highest rate of interest lawful under the laws of the State of Illinois, and for a longer period of time than the money was in fact loaned; and the said defendants, at Chicago, in the State of Illinois, on or about the 16th of May, A. D. 1876, agreed to waive the said rebate of interest due them for the purpose and with the intention of allowing the said company to receive a larger rate of interest upon each of said sums of money than was provided for in said notes, and a larger rate
161 of interest upon the same than was lawful under the statutes of said State of Illinois.

And these defendants aver that they were entitled to a rebate of interest at the rate of ten per centum per annum, in the amounts hereinafter named, on the ground that the said sums of money respectively were not in fact paid and loaned to these defendants on October first, A. D. 1875, but not until the said dates set after each of said sums respectively, as follows:

On the sum of $58,416.73 to January 11, 1876, 101 days	$1,638 93
On the sum of $14,083.27 to January 13, 1876, 103 days	332 94
On the sum of $100 to January 29th, 1875, 119 days	3 31
On the sum of $1,000 to February 3rd, 1876, 125 days	34 72
On the sum of $1,500 to February 28th, 1876, 150 days	62 50
On the sum of $1,003.50 to March 8th, 1876, 158 days	44 04
On the sum of $500 to March 16th, 1876, 166 days	23 05
On the sum of $500 to March 17th 1876, 167 days	23 19
On the sum of $500 to March 27th, 1876, 177 days	24 58
On the sum of $1,421.63 to March 29th, 1876, 179 days	70 70
On the sum of $100 to April 6th, 1876, 187 days	5 17
On the sum of $500 to April 10th, 1876, 191 days	26 53
On the sum of $109.52 to April 15th, 1876, 196 days	5 96
On the sum of $600 to April 20th, 1876, 201 days	33 50
On the sum of $300 to April 22nd, 1876, 203 days	16 92
On the sum of $500 to April 25th, 1876, 206 days	28 61
On the sum of $1,400 to April 29th, 1876, 210 days	81 66
On the sum of $500 to May 9th, 1876, 220 days	30 56
On the sum of $5,000 to May 11th, 1876, 222 days	302 54
On the sum of $1,000 to May 16th, 1876, 228 days	63 05
On the sum of $8,465.35 to May 16th, 1876, 228 days	530 79
And that the total amount of such rebate is	$3,388 05

Which the said defendants were justly entitled to have either
162 paid to them in cash or allowed to them as a deduction from the face of said notes.

And these defendants further allege that about the 16th day of

May, A. D. 1876, at Chicago, in the State of Illinois, the said Continental Life Insurance Company and these defendants exchanged certain receipts or papers wherein these defendants admitted that they had received the full sum of one hundred thousand dollars from the said company, and it was then and there unlawfully agreed by and between the said company and these defendants that, although these defendants had received from said company only the sum of ninety-seven thousand five hundred dollars in cash upon said notes dated October 1st, A. D. 1875, and although these defendants were entitled to a rebate of interest on various sums thereof, aggregating the sum of thirty-three hundred [and] eighty-eight and five hundredths dollars, yet no more or additional money was to be advanced on said notes to these defendants by said company, but that for and in consideration of the loan of such sum of money as aforesaid these defendants should pay the sum of one hundred and sixty-three thousand dollars, the face and full amount of said notes, on the first day of October, A. D. 1880, to the said company.

Whereas these defendants allege that the total amount which could lawfully have been contracted for as interest upon said sums of money so advanced as aforesaid, at ten per centum per annum, up to and until the first day of October, A. D. 1880, under the laws of the State of Illinois, was ($45,361.95) forty-five thousand three hundred and sixty-one dollars and ninety-five cents, and with the principal actually loaned added thereto would amount only to the sum of one hundred [and] forty-two thousand eight hundred [and] sixty one and ninety-five hundredths dollars ($142,861.95), being twenty thousand one hundred [and] thirty-eight and five hun-
163 dredths dollars ($20,138.05) less than the face of said notes.

And these defendants allege that the said notes and the said sums of money advanced thereon from time to time as above set forth and the agreement of the complainants to pay said notes in consideration of the loan of said sums at the time above specified, and the agreement of the said Continental Life Insurance Company to receive the payment of said notes in consideration of the loan of said sums of money as aforesaid, constituted a contract between the said defendants and the said company, wherein and whereby the said company agreed to receive and these defendants agreed to pay to said company the sum of twenty thousand one hundred [and] thirty-eight and five hundredths dollars in usurious, unlawful, and forbidden interest for the use of the sums of money so loaned; whereby and by force of the statute of the State of Illinois in such case made and provided all the interest reserved in said contract of loan and every part thereof became void, and the said company by reason of the premises was entitled to receive from these defendants, and these defendants were bound in law to pay unto said company, only the sums of money actually advanced by said company to said defendants upon said notes without interest, amounting, as before stated, to the gross sum of ninety-seven thousand five hundred dollars, which said sum of money, together with interest thereon at the rate of ten per centum per annum from and after the first day of October, A. D. 1880, these defendants hereby offer to pay to

the said Continental Life Insurance Company or to the legal holder or holders of said notes upon the production and surrender thereof to these desendants.

And these defendants further allege that the said company and the said complainants sometimes give out and pretend that these defendants have no just grounds to allege or set up the usurious and unlawful actings and doings of the said company, and the said de-
164 fendants in and relating to the said notes and the said loan, because they say that on or about the 29th day of January, A. D. 1876, these defendants executed an additional set of twenty-eight notes of even date and of the same amounts as the said notes mentioned in said amended bill of complaint, but drawing interest at the rate of ten per cent. per annum after their date, October 1st, A. D. 1875, and delivered the same to the said John O. Pierson as such trustee. But these defendants allege that they received no manner of consideration for said additional notes; that they were not delivered to said Pierson as evidence of indebtedness against these defendants; that they were, in fact, made and placed in the hands of such trustee at the request of said company, and for purposes of its own, and under an agreement that the same should be returned to these defendants without loss or expense to them; that said additional notes are not and never were secured or intended to be secured by said trust deed; that before the commencement of this suit the said additional notes were, in fact, returned to these defendants by the said company cancelled, and that said additional notes are not, and of right ought not to be, an admission of indebtedness on the part of these defendants.

Further answering, these defendants deny that they are, or either of them is, bound in any event to pay attorneys' fees, as claimed in said bill, in the amounts of four thousand six hundred and fifty dollars, because they allege that each of said notes is tainted with usury, and is not a legal demand for its face, but that all and singular of said notes are subject to a proportionate reduction, aggregating the amount of said claim thereunder, which is unlawful, as aforesaid. And these defendants aver that no lawful judgment could have been entered upon said notes or either of them for the face thereof, and in this regard they allege that it was not in-
165 tended or provided in and by the several warrants of attorney annexed to said notes that these defendants should pay the attorneys' fee therein respectfully specified at all hazards, but only in case a lawful judgment or judgments were thereafter taken and entered upon said note or notes, which these defendants allege has not been done and could not have been done at any time since the same were signed by these defendants.

And these defendants, further answering, deny that they or either of them are or is bound to pay to complainants, as a solicitor's fee in this proceeding to foreclose the said deed of trust, a sum equal to ten per cent. upon the gross amount of principal and interest to be found due upon the said mortgage or deed of trust, in manner and form as the same is demanded in said amended bill.

And in this behalf these defendants aver that the said deed of

trust was given by these defendants to secure a loan of money, and that the provision therein contained in regard to the payment of a solicitor's fee, in case of the foreclosure of said trust deed, was intended to indemnify and save harmless the holder or holders of said notes from the reasonable and actual expense which might be incurred by them in the employment of counsel in said proceeding, in excess of the fees and costs allowed by law; that said provision was not intended and in equity ought not to be regarded as a contract to pay to the holders of said notes a large sum of money in addition to the amount of the loan, in excess of the reasonable and actual expense incurred for solicitor's fees in such foreclosure proceeding, and thus to convert an incident of the security into a means of oppression, whereby the debtor is compelled to pay to the creditor more than his debt and the expense of collection. And these defendants respectfully submit to your honors that whether any sum and, if any, what sum shall be paid by these defendants,
166 or either of them, to the legal holders of said notes, when ascertained, for services to be rendered before this court on behalf of said complainants and against the defendants, should rest, in the discretion of your honors, upon all the facts, circumstances, and equities of the case.

And these defendants, further answering, admit, upon information and belief, that certain taxes have been paid upon portions of the premises described in said deed of trust since the making thereof by some person or persons other than these defendants; but they do not know the exact amount thereof, nor when the same were paid, nor the name or names of the person or persons by whom the same were paid, and in this regard, as to the allegations of said amended bill, they require strict proof thereof of the said complainants, as they shall be advised.

And in case the proofs to be taken herein shall show that said taxes mentioned in said amended bill were in fact paid by the complainants, Aquila Adams, Axel Dearborn, and Asaph Churchill, after they acquired the possession of said notes, the defendant, Caroline M. Forsyth, offers to repay the same, with interest thereon, at the rate of ten per centum per annum, from the date or dates of such payment, as may be directed by this court.

And these defendants, further answering, state that they do not know whether said complainants are the holders of said notes or not, or when, if at all, said complainants obtained possession of the same, but require of the said complainants strict proof of the allegations of said amended bill that said complainants acquired the ownership of said notes before maturity and for a valuable consideration.

But in this regard these defendants allege that neither said complainants, Adams, Dearborn, and Churchill, nor any other person, at any time, either before or since the maturity of said notes,
167 became the *bona fide* and innocent purchasers of said notes, or purchased or obtained possession of the same without notice of the facts relating thereto, and which constitute the same an usurious and unlawful contract. And these defendants aver that

the said complainants had full notice of the usurious and unlawful character of the said notes and of the transaction of the said loan of money to these defendants by said Continental Life Insurance Company before the said notes came into their possession, if the proofs shall show that they are possessed thereof, and the said complainants are bound by the said transaction in the same manner and to the same extent as the said Continental Life Insurance Company.

And the defendant, Jacob Forsyth, for himself, answers the said bill, and says that the said complainants ought not to recover or demand any sum of money whatever from him upon or by reason of the making of said notes or the contracting of said loan; and he alleges that under and by virtue of an act of the Congress of the United States of America entitled An act to establish a uniform system of bankruptcy, approved March 2nd, 1867, and the acts amendatory thereof, to wit, on the 31st day of August, A. D. 1878, in the district court of the United States in and for the district of Indiana, he, the said defendant, was duly adjudicated a bankrupt in and by virtue of an order and decree of said court sitting in bankruptcy, and that subsequently, to wit, on the 30th day of December, A. D. 1880, he, the said defendant, was duly discharged under said law, by the order and decree of said court sitting in bankruptcy, from each and all of the debts of him, the said bankrupt, existing on the 31st day of August, A. D. 1878, aforesaid, which were provable against the said Jacob Forsyth in the said bankruptcy proceeding, as by the records of said court ready to be produced will fully appear. And

168 this defendant avers that the said notes were, and each of them was, a debt existing against said defendant for a portion of the face thereof on said 31st day of August, A. D. 1878, and was, and were, provable to that extent in said proceedings, and that by virtue of said decree of said court discharging this defendant from such debts the said notes mentioned in said amended bill of complaint were discharged as debts against this defendant.

All of which this defendant is ready to aver, maintain, and prove. Wherefore this defendant, Jacob Forsyth, prays to be hence dismissed with his reasonable costs and charges in this behalf sustained.

And the said Caroline M. Forsyth, having fully answered the said bill, prays the court that a decree may be entered herein compelling the said complainants, in case the proof shall show them to be in possession of said notes by assignment or transfer from said Continental Life Insurance Company or otherwise, to surrender the same to her, the said Caroline M. Forsyth, upon payment of the amount lawfully due thereon, and that this honorable court may make such further order and decree in the premises in her behalf as shall be consistent with equity.

169 On the 9th of June, 1881, the defendants signed said answer, and it was mailed by the plaintiffs to McDonald & Butler, at Indianapolis for filing.

A sister of the defendant Caroline M. Forsyth, Miss Harriet S. Clarke, was made a party defendant to the bill to foreclose said Pierson mortgage, and the plaintiffs were requested by the defendants to

answer said bill on behalf of said defendant, Harriet S. Clarke. The plaintiffs were informed by the defendants that said Harriet S. Clarke had become the owner of a tract of land described in said Pierson mortgage, which, by mistake at the time of the making and execution of said mortgage, was embraced within the same; that said defendant, Harriet S. Clarke, had purchased from Robert Clarke Forsyth, a son of the defendants, a tax title of said tract, and that the defendants were desirous of protecting the interests of said Harriet S. Clark, and of preventing the sale of said tract of land in said foreclosure suit.

The plaintiffs on the 10th of June, 1881, telegraphed to McDonald & Butler, at Indianapolis, to obtain an extension of time for the filing of the answer of Harriet Clarke in said suit.

The plaintiffs prepared a plea on behalf of said defendant as follfollows:

170 IN PL'FFS' EX. 23.

United States Circuit Court in and for the District of Indiana. In Chancery.

AQUILA ADAMS, AXEL DEARBORN, ASAPH CHURCHILL, and JOHN O. PIERSON, Trustee,

v.

HARRIET S. CLARKE, Impleaded with Caroline M. Forsyth and Others.

The plea of Hariet S. Clarke, one of the defendants to the amended bill of complaint lately filed in said court against her and other persons as defendants, by Aquila Adams, Axel Dearborn, Asaph Churchill, and John O. Pierson, trustee, etc., complainants.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the complainants' said amended bill of complaint mentioned and contained to be true in such sort, manner, and form as the same are therein set forth and alleged for plea to the same, and the whole thereof, says that she is the owner in fee-simple of that portion of the lands mentioned in said amended bill of complaint described as follows:

The southeast quarter of the northwest quarter of section seventeen, in township thirty-seven, range nine west, in the county of Lake and State of Indiana, and has and claims no interest, right, or title in any other portion of the lands mentioned or described
171 in said amended bill; that she did not acquire said title from, by, through, or under the said complainants or the said Jacob Forsyth and Caroline M. Forsyth, or either or any of them, or the assigns or grantees of them, or either or any of them; that her said title is not subordinate to nor derived from the said title of said Jacob Forsyth and Caroline M. Forsyth, set forth in said amended bill of complaint, but is superior and adverse thereto.

That this defendant claims the said above-described land by and through a certain deed of conveyance, dated February 18th, A. D. 1879, duly executed and delivered by the State of Indiana by John Brown, auditor of said Lake county at that date, to one R. Clarke

Forsyth, the grantee therein named, which said deed was received for record on the 25th day of February, A. D. 1879, by Richard W. Price, recorder of said Lake county, and was recorded by him in record No. 5 of said county, at page 173, and was duly entered for taxation on February 18th, A. D. 1879, by John Brown, auditor of said county.

That said deed of conveyance granted, bargained, and sold unto said R. Clarke Forsyth, his heirs and assigns, forever, the said above-described tract of land, to have and to hold the same, with the appurtenances thereto belonging, to the said R. Clarke Forsyth, his heirs and assigns, forever.

That by deed dated thereafter and heretofore on the — day of ——, A. D. ——, the said R. Clarke Forsyth conveyed all his right, title, and interest in said described land to this defendant; and she claim the said lands in fee-simple by such title adversely to the title of the said complainants, and of all other of said defendants who claim or may claim any interest in said land.

And this defendant avers that the said amended bill of complaint exhibited against this defendant and the several other per-
172 sons therein named as defendants thereto unites distinct matters and causes which ought not to be joined in one suit, in several whereof, as appears from said bill and the facts herein set forth, this defendant is not in any manner interest or concerned, and that the said amended bill is altogether multifarious.

All which matters and things this defendant avers to be true and pleads the same to the whole of said amended bill, and prays the judgment of this honorable court whether she ought to be compelled to make any answer to the said amended bill of complaint, and prays to be hence dismissed with her reasonable costs in this behalf sustained.

(The same was sworn to.)

On the 11th of June the said plea was forwarded to McDonald & Butler at Indianapolis with the following communication:

PL'FFS' EX. 27.

"JUNE 11TH, 1881.

"GENTLLMEN: We send you enclosed herewith plea of defendant Harriet S. Clarke, and also the copy of the amended bill of complaint in the Forsyth case.

"We concluded it was better for her to plead instead of answering, because it is really matter of abatement, taking the view that an adverse title cannot be tried in a foreclosure suit.

"A blank certificate of counsel is left at the close of the paper, which one of your firm can sign.

"If anything occurs touching the form of the answers of Mr. & Mrs. Forsyth or the plea of Miss Clarke we shall be pleased to hear from you in that regard, and in any other matter concerning the

litigation we shall be pleased to render you any service in our power.

"With thanks for your courtesy, we remain,

173 "Yours, very truly,

"DOOLITTLE & McKEY.

"Messrs. McDonald & Butler, Indianapolis, Ind."

On the 7th of July the defendants wrote to Messrs. McDonald & Butler and made inquiries as to whether the defendant, Studdy Leigh, had appeared to the bill to foreclose and had answered, and requesting to know what was set up in the answer.

On the 14th of July, 1881, McDonald & Butler wrote, stating: That "George C. Butler, who has charge of the Forsyth case, is taking his vacation. Leigh has answered alleging briefly conveyance and agreement to convey free from liens to Trearmaine, trustee; the *cestui que* trusts willingness to carry out; Forsyths' inability on account of suit; the Continental Insurance Company is really the owner of the notes; that Forsyths never received all or nearly all of — money borrowed; that attorneys' fees are not collectible anyhow, and conspiracy to prevent the sale. G. C. B will explain fully when he comes."

The plaintiffs waited until the 27th of July for a communication from McDonald & Butler, and on that date wrote to McDonald & Butler as follows:

PL'FFS' EX. 57.

"GENTLEMEN: Will you oblige us by taking a copy of the answer filed by Studdy Leigh in the Forsyth mortgage foreclosure, and forwarding the same to us."

They received no reply to this letter, and on the 5th of August wrote to McDonald & Butler again, as follows:

"GENTLEMEN: Allow me to call your attention to our

174 letter requesting a copy of the answer filed by Studdy Leigh. We desire very much to know exactly what he has set up in his answer."

On the 8th of August, 1881, McDonald & Butler enclosed a copy of the answer filed by Studdy Leigh, as follows:

IN PL'FFS' EX. 23.

United States Circuit Court, District of Indiana. June Term, A. D. 1881. In Chancery.

AQUILA ADAMS and Others *vs.* CAROLINE M. FORSYTH and Others.

The joint and several answer of John Studdy Leigh and John Petherick, two of the defendants, impleaded with Caroline M. Forsyth and others, to the amended bill of complaint of Aquila Adams, Axel Dearborn, Asaph Churchill, and John O. Pierson, complainants.

These defendants, John Studdy Leigh and John Petherick, now and at all times hereafter, saving and reserving to themselves all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said amended bill contained, for answer thereunto or to so much and such parts thereof as these defendants are advised, is or are material or necessary for them to make answer unto, answering, say that the said defendants, Caroline M. Forsyth and Jacob Forsyth, then being seized and possessed of the premises and real estate described in the amended bill of complaint by defendant, John Petherick, their attorney, duly nominated, authorized heretofore, to wit, on the 22d day of January, A. D. 1881, made and entered into a certain agreement in writing, dated on that day, in and by which said agreement they, the said Caroline M. Forsyth and Jacob Forsyth, by their said attorney conveyed, and covenanted, and agreed to ex-
175 ecute and deliver proper deed or deeds of conveyance for the said premises and real estate in said amended bill described, free and clear of and from all liens and incumbrances whatsoever to one Charles Edward Tremearne, as trustee for and in behalf of him, the said Tremearne, the defendant, John Studdy Leigh, and Edward Payne, of Chicago, in the State of Illinois, which three persons last above named were to furnish the purchase-money for said conveyance and the said real estate, and it was further stipulated, covenanted, and agreed, in and by said agreement, that the purchase-money aforesaid was to be one million dollars, lawful money of the United States, to be paid in four certain installments, as in said agreement more particularly set forth, which said agreement these defendants will produce here in court on the trial of this cause, together with the letters of attorney and other instruments authorizing the making and executing said agreement so conveying said real estate as aforesaid.

And these defendants, further aver-ing, say that the said Tremearne has executed said agreement and holds the same, and all the estate, right, title, interest, claim, and demand of, into, and upon the real estate aforesaid acquired by said agreement for the joint benefit and behalf of him, the said Tremearne, John Studdy Leigh, and Edward Payne, who are the beneficiaries and *cestui que* trust for whom and in whose behalf said agreement was made, and that they, the said Tremearne, Leigh, and Payne, have ever been ready from thence hitherto and now are ready and do hereby offer to carry said agreement into effect and make the payment as therein stipulated and provided, and execute all and singular the covenants, conditions, and agreements on the part of said Tremearne, to be executed under and in pursuance of said agreement according to the true intent and meaning thereof, and generally to do equity in the premises.

And these defendants further say that, owing to the pre-
176 tended claim of the said complainants in this said amended bill alleged and recited, the said Caroline M. Forsyth and Jacob Forsyth have become unable to convey the said real estate free and clear of all liens and incumbrances in manner and form as is provided in and by said agreement, and cannot give good and quiet

title thereto, and have refused, and now absolutely refuse, to carry said agreement into effect on their part, alleging as an excuse for such refusal the pendency of this suit, all of which facts, matters, and things hereinabove alleged and charged were well known to said complainants at the time of the exhibiting their amended bill herein.

And for further answer these defendants say they are informed and believe, and so state the fact to be, that the said complainants, Aquila Adams, Axel Dearborn, and Asaph Churchill, are not the legal owners or holders of the promissory notes in said amended bill described, but that in truth and in fact the Continental Life Insurance Company, in said amended bill named, is the owner of said notes, and each and every of them, and the said Adams, Dearborn, and Churchill have not, nor has either of them, ever in good faith purchased said notes, or either of any of them, or ever paid or parted with any consideration thereof, but that the said Adams, Dearborn, and Churchill now pretended to be the owners and holders of said notes, so as to protect the said insurance company against any meritorious, good, and valid defence which the said Caroline M. Forsyth and Jacob Forsyth, or these defendants holding and claiming from or under them, have or could have, claim, or maintain herein, all of which pretences are a fraud upon the rights and equities of the said Caroline M. Forsyth and Jacob Forsyth and these defendants, and the said persons claiming under them, to wit, said Tremearne, Leigh, and Payne.

And these defendants, further answering, say they are informed and believe, and so charge the fact to be, that the said Conti-
177 nental Life Insurance Company never actually loaned to the said Caroline M. and Jacob Forsyth, or either of them, a sum of money exceeding eighty thousand dollars or thereabouts and no more, and that the said company was often requested to pay up and advance the balance of said sum of one hundred and sixty-three thousand dollars, being the amount of principal money of the said promissory notes in said amended bill described, yet the said company refused and utterly failed to pay or advance such balance, or any part thereof, and these defendants say there is not owing to said insurance company any greater sum than the amount actually loaned, advanced, or paid by it for or on account of said notes with the lawful interest thereon from the date of such payment hitherto and no more, all of which was well known to said complainants long before and at the time when said pretended transfer of said notes to them were made; and these defendants were ever ready and willing and now offer to pay whatever sum of money shall, at the trial of this cause, be found to have been advanced or paid by said insurance company for or on account of said notes, with lawful interest as aforesaid, and to have the same deducted from the purchase price or consideration to be paid to said Caroline M. and Jacob Forsyth under and in pursuance of the said agreement.

And these defendants, further answering, say that the said sum of $4,650 *dollars* attorneys' fees, which the said complainants have alleged was, by the terms of said notes and certain contracts thereunto

attached, to be added to the principal sums mentioned in said notes, has not become due or payable by the terms aforesaid, but that it was ever understood by the said insurance company and all other parties interested in the premises that such attorneys' fees should be charged only in case judgment has been obtained in any suit or suits at law brought for the collection of said notes, whereas
178 no such suit at law has ever been instituted or brought for the collection of said notes, or any or either of them, and the said attorneys' fees have never been earned or become payable, all of which was well known to the said complainants at the time of the exhibiting by them their bill and amended bill herein.

And these defendants, further answering, say that the said complainants are not entitled to, and should not be allowed by this honorable court to recover, the sum of ten per cent. upon any indebtedness that may be shown upon or by virtue of said mortgage, or to have such ten per cent., or any per cent. or percentage, added for solicitor's fees; that such solicitor's fees are exorbitant, and are based upon fictitious sums of money never had or received by the said Caroline M. or Jacob Forsyth, and upon attorneys' fees not yet earned, owing, or payable, and are oppressive, unjust, and contrary to equity.

And, for further answer, these defendants say they are informed and believe, and so charge the facts to be, that the said Continental Life Insurance Company, conspiring and confederating with the said complainants and other persons, to these defendants unknown, whose names, when discovered, these defendants pray permission to insert herein, how to wrong, injure, and oppress these defendants and the said Tremearne and Payne, and to hinder and prevent them and the said Caroline M and Jacob Forsyth from carrying this said agreement into effect, have caused the said complainants to institute this suit, and by the allegations in said amended bill, and various other crafty and subtle devices, to so increase any debt the said Forsyth may be found owing to the said insurance company for or on account of said notes or any money advanced to them, and thereby rendered it impossible to fairly, justly, and properly pay and satisfy the same, and to discharge the said real estate from the apparent lien and incumbrance of the said mortgage, and seeking and
179 endeavoring to obtain possession and control of said real estate, and depriving these defendants thereof of all benefit and advantage to be derived by, or from, or under said agreement by these defendants and the said beneficiaries, to wit, Tremearne, Leigh, and Payne, and to further obtain large, exorbitant, and unjust sums of money from these defendants.

And these defendants, further answering, say they have not any knowledge or information sufficient to form a belief whether the said complainants have paid any sum or sums of money for any taxes assessed, levied, or imposed on said real estate, and they leave said complainants to their proof thereof; and they, these defendants, are ready and offer to repay the same, or so much thereof as may be just and equitable for them to pay, and pray that such pay-

ment, when made by them, may also be deducted from the said purchase price or consideration.

And these defendants deny that the complainants are entitled to the relief, or any part thereof, in the said amended bill of complaint demanded, and pray the same advantage of this answer as if they had pleaded or demurred to the said amended bill, and pray to be hence dismissed, with their reasonable costs and charges in this behalf most wrongfully sustained.

FRANCIS DESFUHL,
Solicitor & of Counsel for John Petherick and John Studdy Leigh.
JOHN PETHERICK,
By FRANCIS DESFUHL, *His Att'y.*
JOHN STUDDY LEIGH,
By FRANCIS DESFUHL, *His Att'y.*

180 The plaintiffs examined the said answer and advised the defendants that they were not in a position to object to the same, and could raise no issue thereon in the foreclosure suit unless the said Leigh and Petherick should file a cross-bill and call upon the defendants to answer it, or unless the defendants should themselves file a cross-bill against said Leigh and Petherick.

The plaintiffs advised the defendants that the said answer might constitute a cloud on their title, and occasion difficulty in securing the acceptance of the title by the purchaser under the contracts with Joseph P. Ord. But the plaintiffs stated to the defendants that inasmuch as the said Leigh and others had commenced another suit in the circuit court of Lake county, Indiana, against said Caroline M. Forsyth and Jacob Forsyth, covering substantially the same grounds set up in the said answer of Leigh and Petherick, they might be able to dispose of said claim in the last suit in a direct manner, and that it was not requisite to take any steps in court in regard to said answer at the time.

The complainants in said foreclosure suit did not proceed to the taking of testimony. About the 1st of September, 1881, the plaintiffs conferred with the defendant, Jacob Forsyth, in regard to the case, and it was suggested that perhaps the complainants might not take any testimony in the foreclosure suit, but would attempt to dismiss the same and sue upon the notes in another jurisdiction, and that if the property should be sold under the option contract to Mr. Ord, the complainants might endeavor in some way to reach the fund to be deposited as an indemnity against said mortgage with the Mercantile Trust Company in New York.

On the second of September the plaintiffs wrote to McDonald & Butler, Indianapolis, among other things, as follows:

"In the answer of Caroline M. Forsyth, at the conclusion,
181 is a prayer for affirmative relief, praying a decree for the surrender to her of the notes upon the payment of the amount due, and for general relief. Her answer, while based generally upon the defense of usury, is also, to a certain extent, a prayer for the establishment of the true contract between the parties by the decree.

The question is, can the complainants, if so disposed, dismiss the bill as against her and sue on the notes? 2d. Can they sue on the notes without dismissing the bill? The matter may assume an important phase at an early day in case of the payment to Mrs. Forsyth of a large sum of money in New York, which the note holders might seek to reach by attachment. My own impression is that under the Federal practice the suit cannot now be dismissed as against Caroline M. Forsyth, and that she having prayed for the return of the notes in this suit, they cannot be sued on in any other tribunal. Of course we could file a cross-bill, but not without tendering the amount due, which just at present we are unable to do.

"Will you give these points an early investigation and an early answer, and much oblige, etc."

On the 7th of September the plaintiffs received from McDonald & Butler a communication, stating that they thought the suit could be dismissed at any time by the complainants.

The plaintiffs had several interviews with the defendants in regard to the taking of evidence to sustain their said answer in said foreclosure suit. No doubt was expressed as to the ability of the defendants to show by proof the usurious character of the transaction, but the main point of difficulty was to be able to show that the complainants in said suit, Adams, Dearborn, and Churchill, were not *bona fide* holders of the notes. The plaintiffs stated to the defendants that the notes were made payable to the order of the defendants and endorsed by them in blank, and that prob-
182 ably if the complainants held the notes they would bear no other endorsement and would be presumed to belong to the holders without any written endorsement or assignment upon the same; that the continental Life Insurance Company had probably transferred the notes in some way to the complainants in the hope of being able to avoid the defense of usury, and that while said company was not a party to the record it really was in possession of all the evidence showing the alleged transfer and the real ownership of the notes, and that said company had probably devised some scheme to cover up the real facts. The plaintiffs stated that, in their judgment, an effort must be made to get on the inside of the insurance company in some way and ascertain what had been done with the notes. Said defendant Jacob Forsyth stated that he had a letter written by the president of said insurance company only a short time before the maturity of said notes, in which it was stated that the company still at that time had them in its possession, but neither the plaintiffs nor the defendants had any positive evidence that the notes had not been in fact transferred before maturity.

There was a discussion about the advisability of employing some person at Hartford, Connecticut, for the purpose of making the investigation. The plaintiffs advised that great caution should be observed in regard to the matter; that if any mistake were made in the person selected for the purpose, or in any step which he might take in regard to the matter, the insurance company would take alarm and might resort to other measures of concealment.

The defendants expressed a strong desire for the postponement of

the taking of the testimony and the hearing of the foreclosure case until after the question should be determined whether the land should be sold under the option contracts with Joseph P. Ord.

In the latter part of September, 1881, Mr. Morris W. Sey-
183 mour, an attorney-at-law, residing at Bridgeport, in Connecticut, was in Chicago, and the plaintiffs in conference with him suggested that he should take charge of the investigation in regard to the said notes at Hartford. They spent several hours with him explaining the features of the transaction as they understood them, and requested him on his return to Connecticut to give the affair a careful, thorough, and prudent investigation.

On the 7th of October, 1881, the plaintiffs addressed the following letter to Messrs. McDonald & Butler:

PL'FFS' EX. 73.

"OCT. 7TH, 1881.

GENTLEMEN: In regard to the taking of the testimony in the case of the foreclosure of the Pierson mortgage on the Forsyth lands, we prefer to have the time extended for the present, if it is a possible thing to be done, and under existing circumstances such extension would not seem impracticable.

The complainants have taken no testimony, yet so far as we are informed, and in our opinion they will be compelled at least to prove the assignment of the notes to them.

If they should give notice to take such testimony we would have an opportunity on cross-examination to sift that part of the case.

We understand that under the Federal equity practice the complainants must show their ownership of the notes by depositions taken before the hearing, and cannot in the first instance produce the notes before the court on the hearing, and prove the assignment in open court. The answer does not admit the ownership of the notes, and requires proof.

If we are right on this point the complainants are as much in default as the defendants in the matter of proofs, and, if the
184 cause was at issue at the July term, they will be compelled to apply to the court for an enlargement of the time under rule 69. Upon such application the court would allow us sufficient time also.

The proofs as the amount of the loan actually advanced and the time when it was advanced can be made here. The evidence as to the transfer of the notes and the circumstances which we wish to bring out concerning the transfer from the Continental Life Insurance Co. to the present holders must be made elsewhere.

We have retained a party at the East to have that matter looked up and expect partial reports within a week or ten days. Until we get the facts we shall not be able to commence taking evidence in that direction.

We have learned that the Continental Insurance Co. has a poor status in Connecticut as a business institution, and probably with a

little time we can get down to the real facts connected with the alleged transfer.

Testimony may have to be taken in Boston, where the complainants reside.

The sale of the property is still pending, but will probably be completed within forty days and the money paid. Then, in case of a favorable outcome, we shall be in a position to tender the amount due, and, if deemed advisable, file a cross-bill based upon the tender.

We hope you will give the pleadings a careful inspection and write us your opinion as to whether the complainants can go to a hearing without taking any testimony.

It does not look as though the complainants are especially anxious to force the case to a hearing. What are your impressions as to that?

Yours, very respectfully, etc.

_____ _____."

185 On the 8th of October, 1881, McDonald & Butler wrote upon this subject as follows:

PL'FFS' EX. 74.

"In the foreclosure case we are not clear that the complainants will need to do more than to produce the notes and mortgage, with the proper assignments appearing thereon, in order to make their *prima facie* case, particularly as they have entered an amendment waiving the answer under oath. When can you be ready to take the Chicago evidence and when the evidence East? If we ask an extension of the time we will at least want to signify when we can take the evidence. The case was put at issue July 12th."

On the 11th of October, 1881, one of the said plaintiffs, J. R. Doolittle, Jr., mailed a note to Mr. M. W. Seymour, and another on the 26th of October.

On the 31st of October, 1881, said plaintiff, J. R. Doolittle, Jr., received a personal communication from M. W. Seymour, in substance stating that the printed reports of the insurance commissioner did not give any light on the subject of the Forsyth notes, and for that reason he had not forwarded them; that up to 1878 the Forsyth notes appeared as an asset of the company, and that during the next year they disappeared, and as yet he could find no trace of any money or equivalent coming into the company to make good the apparent loss; that on the 31st of December, 1880, one E. A. Dammer, a Boston man, borrowed of the company $163,272.69 and gave his note therefor, payable on demand with interest at six per cent., and pledged as collateral security for its payment the Forsyth notes, which were then in the possession of the company.

The plaintiffs advised the defendants that it would be necessary to make inquiries in regard to said Dammer and the complainants who resided in Boston, Mass., and while the information
186 which might be received by the plaintiffs from Mr. Seymour would be confidential, still it would be entirely reliable, and

the defendants should have the entire benefit of it. The plaintiffs advised the defendants that the discovery of the notes in the hands of the Continental Life Insurance Co., pledged as collateral security to a note of E. A. Dammer, was a most important fact in the case, for it would be hard for Adams, Dearborn, and Churchill to claim to be the owners of the notes and prosecute a suit for their collection and for the enforcement of the mortgage when said notes were in the possession of the Continental Life Insurance Co., pledged as collateral security for the debt of E. A. Dammer. The plaintiffs advised that Mr. Seymour should go to Boston and make a thorough investigation there in his own way, and requested the defendants to furnish the necessary funds for the purpose.

On the same day the plaintiffs telegraphed said Seymour, and also addressed the following letter to him:

PL'FFS' EX. 48.

"OCT. 31ST, 1881.

"My dear Mr. SEYMOUR: Your letter is duly received. In reply I will simply state that we want you to push the investigation in your own way, as the developments shall indicate to your mind the best course. By all means spare no effort. Do not fail to go to Boston, and sift the matter there. We intend to fight this question for all there is in it, and there is a great deal in it.

"Do not spare any reasonable expense. Whatever you consider proper to be spent will be sustained here. I have talked fully with Mr. Forsyth on the subject, and he expresses himself perfectly satisfied with my views and programme.

"Enclosed I send you draft on N. Y. for $250. Please report often, as we are anxious to get the facts. Mr. Forsyth has a letter
187 written within a month before Oct. 1, 1880, when the notes fell due, signed by the president of the ins. co., in which he states that the company had the notes at that time.

"I will send you a copy of it.

"Yours, very truly, etc.

"_____ _____."

The plaintiffs advised the defendants that as soon as further information should be received concerning the parties at Boston they would proceed to take testimony there.

On the second of November one of said plaintiffs was at Indianapolis, Ind., and ascertained from the clerk of the United States circuit court that the suit of Adams, Dearborn, and others against the defendants to foreclose the mortgage had been voluntarily dismissed by the complainants on the 26th of October, 1881. No notice had been served either upon the plaintiffs or McDonald & Butler, the attorneys at Indianapolis. Said plaintiff conferred with McDonald & Butler in regard to the matter, stating to them that the dismissal of said suit at that time would work a very serious inconvenience to the defendants in completing the sale under the contracts with Joseph P. Ord.

A motion was entered before the court to reinstate said cause, and it was determined at the conference between said plaintiff and McDonald & Butler that it would be advisable and advantageous to the defendants if a bill could be filed to redeem said lands from said mortgage, provided satisfactory arrangements could be made with said Ord, under which a sufficient sum of money could be paid into the court to enable the defendants to make a tender of the amount due. It was agreed between said plaintiff and McDonald & Butler that said plaintiff should draw the bill to redeem,
188 and as soon as the necessary money could be obtained from the sale of said lands to deposit the necessary amount in said court. It was stated by said plaintiff to McDonald & Butler that the sale of the Forsyth estate under the contracts with Joseph P. Ord would probably be completed on the 10th of November, and that the plaintiffs would endeavor to have the bill to redeem prepared and ready for filing on that day or the day after, and would endeavor to secure a modification in the contracts with said Ord, so as to enable the defendants to file said bill.

It was also contemplated and stated that in case the court should set aside the order of dismissal, or would treat the foreclosure suit as in court, so as to enable the defendants to file a cross-bill therein, such action might be taken in the foreclosure suit instead of in a new suit.

After the said conference with McDonald & Butler said plaintiff addressed to Joseph E. McDonald, the senior member of said firm, the following communication.

Pl'ffs' Ex. 42.

My Dear Senator: A matter has occurred to me since I left you which I wish to communicate. When I was in New York in September making certain final arrangements as to the closing up of the Forsyth sale I found the attorneys there very much set against paying the money into court without first obtaining an order of the court authorizing and directing such payment. The ground they took was that a payment without the direction of the court was a voluntary deposit of the money, subject to the risk of the party making the deposit.

Whether that point is well taken or not is not for me to decide. On the part of the Forsyths I would have no hesitation at all in having the deposit made without an order of the court in the registry. But the views and wishes of the Forsyths are not the
189 only ones which have to be consulted. Under our unrecorded contracts with Ord we are bound to satisfy him as to the safety of the deposit.

Now, in case the new bill is filed to redeem from the ins. co. mortgage, it may take two months before we can get the defendants into court and get an order on them which will authorize us to deposit the money as a substitute for the lien of the mortgage on the lands. During that two months or more I do not want the money to remain either in Ord's hands or be deposited in New York,

for our opponents would surely get wind of it and begin by attachment, either in New York or New Jersey, probably in New York.

I want to accomplish two things: First, to have the money in Indiana, where judgment cannot be entered upon judgment notes, and where the Forsyths reside; and, second, I want it so deposited that Ord will be absolutely sure of its safety in the meantime. When the order is made by the court the money can be deposited in court.

Have you in Indianapolis a good reliable safe depository where the money can be placed as a special deposit, and can bonds be obtained from responsible parties residing here that it will be forthcoming?

I suppose you have such institutions. I don't think Ord would agree to deposit the money with a bank.

If you are sure that proper arrangements and guarantees can be had to satisfy Mr. Ord and his counsel please telegraph me to-morrow at Chicago. I wish to know about this as soon as possible in order to present the matter in a favorable aspect to the parties with whom I am negotiating.

If satisfactory arrangements can be made on this point I can defer the closing of the trade at Chicago until we can all come on to Indianapolis and have the delivery of deeds and payment of money
190 made here, and the new bill can be filed at the same time. I am bound to head off an attachment anyhow.

As ever, yours truly, J. R. DOOLITTLE, JR.

Hon. J. E. McDonald.

Please telegraph me anyway, at my charge.

Said plaintiff also sent the following telegram:

"INDIANAPOLIS, *Nov.* 2, 1881.

"Morris W. Seymour, Bridgeport, Conn.:

"Telegraph me Chicago any considerable discoveries within the next two or three days."

On the 4th of November the plaintiffs received a telegram from Mr. Seymour stating that he had had good luck in Boston and had written particulars. On the 7th of November the plaintiffs received a lengthy confidential communication from said Seymour, and the plaintiffs, in conversation with the defendant, Jacob Forsyth, stated that they had received valuable information in regard to E. A. Dammer; that he was a book-keeper in the Broadway National Bank of Boston, the same bank of which Axel Dearborn was the president, Aquila Adams the cashier, and Asaph Churchill the attorney; that said Dammer lived with a widowed sister, and paid no taxes, either at his place of residence or in Boston, was a fine book-keeper, but a man of no means whatever; that he had been secretary and book-keeper of the Boston musical festival a few years ago, but he was a man of no property.

The plaintiffs then stated to said Jocob Forsyth that they could now understand how the pretended transfer of the Forsyth

191 notes had been made to the complainants in the foreclosure suit. The Continental Life Insurance Company had handed the notes to Dearborn, and Dearborn had handed them to a clerk in his bank, and the clerk had handed themback to the Continental Life Insurance Company, borrowing $163,000 and over on the notes. The check of the Continental Life Insurance Company had been given to the clerk, the clerk had handed it to the president, and the president had handed it back to the Continental Life Insurance Company. That it was a fraud and a trick the plaintiffs stated that they had no doubt, but it was placed in such shape that some of the parties might feel themselves able to swear that there had been an actual transfer of the paper.

The plaintiffs advised the defendants that in preparing the bill to redeem they would allege sufficient facts to inform the Continental Life Insurance Company, Adams, Dearborn, Churchill, and Dammer that we were in possession of facts showing our familiarity with the transaction in regard to the transfer of the notes, but that the allegations upon this subject should not be too much in detail, for in some of the points of our information there might be an error, and that in that event our opponents would not be slow in taking advantage.

The plaintiffs thereupon proceeded to the preparation of a bill to redeem from said mortgage. Said bill so prepared by the plaintiffs is as follows:

IN PL'FFS' EX. 49.

UNITED STATES OF AMERICA, *District of Indiana*, } *ss:*

To the judges of the circuit court of the United States for the district of Indiana, in chancery sitting:

Humbly complaining your oratrix, Caroline M. Forsyth, and your orator, Jacob Forsyth, both citizens of the State of Indi-
192 ana, bring this their bill of complaint against Aquila Adams, Axel Dearborn, Asaph Churchill, E. A. Dammer, all citizens of the State of Massachusetts; John O. Pierson, a citizen of the State of Illinois, and The Continental Life Insurance Company of Hartford, a corporation incorporated under the laws of the State of Connecticut, and a citizen of the State of Connecticut, and respectfully show unto your honors that on or about the thirtieth day of December, A. D. 1875, the said Caroline M. Forsyth, being the owner in fee-simple of the several pieces or parcels of land hereinafter mentioned, united with said Jacob Forsyth, her husband, in the making and execution of a certain mortgage or deed of trust to said defendant, John O. Pierson, as trustee, for the purpose of securing the payment of a loan or loans of money made and to be made to said Caroline M. Forsyth by the said Continental Life Insurance Company, which said trust deed conveyed to said Pierson, by way of mortgage, the following-described lands:

The west half ($\frac{1}{2}$) of the southwest quarter ($\frac{1}{4}$) of section six (6), the west half ($\frac{1}{2}$) of the northwest quarter ($\frac{1}{4}$), the southeast quarter ($\frac{1}{4}$) of the northwest quarter ($\frac{1}{4}$), the southwest quarter ($\frac{1}{4}$) of the north-

east quarter (¼), and lots one (1) and two (2) in the southwest quarter (¼), and lots three (3) and four (4) in the southeast quarter (¼) of section seven (7), the west half of the southwest quarter (½) of section eight (8); all of section seventeen (17), except the northeast quarter (¼) of the southwest quarter (¼) thereof, the south half (½) of the southeast quarter (¼) and lot three (3) in the southeast quarter (¼), section eighteen (18); all of fractional sections nineteen (19) and twenty-two (22); all of sections twenty-seven (27), twenty-eight (28), and twenty-nine (29), the northeast quarter (¼), the northeast
193 quarter (¼) of the northwest quarter (¼), the north half (½) of the southeast quarter (¼), the southeast quarter (¼) of the southeast quarter (¼) and the fractional northwest quarter of the northwest quarter (¼) of section thirty (30), lots one (1) and two (2) in the northeast quarter (¼), lot three (3) in the northwest quarter (¼), the northeast quarter (¼) of the northeast quarter (¼) and the northeast quarter (¼) of the northwest quarter (¼) of section thirty-two (32), lots one (1) and two (2) in the northeast quarter (¼), lots three (3) and four (4) in the northwest quarter (¼), and the north quarter (¼) of section thirty-three (33), lot (4) in the northwest quarter (¼), lot three (3) in the southwest quarter (¼), lots (1) and two (2) in the southeast quarter (¼), and the northeast quarter (¼), the east half (½) of the northwest quarter (¼) and the northwest quarter (¼) of the northwest quarter (¼) of section thirty-four (34); all of section twenty (20) and twenty-one (21) and all of fractional sections fifteen (15), lot four (4), and the fraction south of the river of the southwest quarter (¼) of section thirty-five (35), the fractional southeast quarter (¼) of the northeast quarter (¼), the west half (½) of the northeast quarter (¼), the east half (½) of the northeast quarter (¼), the west half (½) of the southwest quarter (¼), and the east half of the southeast quarter of section sixteen (16); all in township thirty-seven (37) north, range nine (9) west of the second principal meridian, in the county of Lake aforesaid.

Also the following-described real estate situated in said county of Lake and State of Indiana, to wit: Lots two (2) and three (3) in the southeast quarter and the east half (½) of the northeast quarter (¼), except right of way of railroad of section one (1), lots one (1) and two (2) in the northeast quarter, and lots three
194 (3) and four (4) in the southeast quarter (¼) of section twelve (12); all of fractional section thirteen (13), lot two (2) in the northeast quarter (¼), lot three in the northwest quarter, the northwest quarter (¼) of the southwest quarter (¼), and the southeast quarter (¼) of the southeast quarter (¼) of section twenty-four (24); all in said township thirty-seven (37) north, range ten (10) west, of the second principal meridian, in the county of Lake aforesaid; the land hereby conveyed containing in the aggregate seven thousand seven hundred and fifty and thirty-three hundredths (7,750.33-100) acres. Certain portions of the land hereby conveyed in sections fifteen (15), sixteen (16), and twenty-two (22), in township thirty-seven (37) and range nine (9) aforesaid, and the east half of the northeast quarter (¼) of section one (1) in township thirty-seven (37) and range ten (10) aforesaid, are subject to the rights of

way of certain railroads now running over said land, and such lands are hereby conveyed subject to such rights of way.

Which said trust deed was thereafter, to wit, on the 31st day of December, A. D. 1875, filed for record and duly recorded in the office of the recorder of the county of Lake, in the State of Indiana aforesaid, in said district, and to which, for greater precision, your oratrix and orator beg leave to refer, a copy of which they hereto attach as a part of this their bill.

Your oratrix and orator allege that said trust deed was given by them to secure the payment of twenty-eight certain promissory notes—five for the sum of ten thousand dollars each, twenty-two for the sum of five thousand dollars each, and one for the sum of three thousand dollars, bearing date at Chicago, in the State of Illinois, October first, A. D. 1875, aggregating the sum of one hundred and sixty-three thousand dollars, all of said notes being payable five years from date, without interest, at the home office of the
195 Continental Life Insurance Company of Hartford, and with interest at the rate of ten per centum per annum after maturity, and made payable to the order of your oratrix and orator, and were endorsed by them and delivered to the Continental Life Insurance Company; but they aver that the said notes were not so made at that date, nor until on or about the 30th day of December, A. D. 1875, nor delivered until about January 1st, 1876.

Your oratrix and orator have not seen the said notes since they were delivered as aforesaid, and are unable to give copies of the same in this their bill of complaint.

Your oratrix and orator further show that it was agreed by and between your oratrix and orator, on the one part, and the said Continental Life Insurance Company, on the other, before the making and delivery of said deed of trust and said notes, that the said company should loan to your oratrix and orator the sum of one hundred thousand dollars for the period of five years, and that your oratrix and orator should, for the use and forbearance of said sum of one hundred thousand dollars for the period of five years, pay to said company the sum of sixty-three thousand dollars as interest thereon, said sum being thirteen thousand dollars more than the highest rate of interest allowed by the laws of Illinois would produce as interest on the said sum of one hundred thousand dollars for the period of five years.

And your oratrix and orator charge that the said agreement was an unlawful and usurious contract, forbidden by the laws of the State of Illinois, and that the said Continental Life Insurance Company, in making the same, intended and knowingly designed to exact and receive from your oratrix and orator unlawful and usurious interest to the amount of thirteen thousand dollars for the loan and forbearance of the sum of one hundred thousand dollars
196 for the period of five years.

And you oratrix and orator charge that in pursuance of said unlawful and usurious agreement, and for the unlawful purpose of carrying the same into effect, the said deed of trust and said notes were made, executed, and delivered by your oratrix and

your orator, and were accepted and received by the said Continental Life Insurance Company, and that the same were not executed and delivered for any other purpose or for any other consideration.

And they charge that the said agreement and the said notes and deed of trust were usurious in their inception and unlawful under the statutes of the State of Illinois, wherein the same were made and entered into.

And your oratrix and orator further charge that for the purpose of exacting usurious interest on said intended loan of one hundred thousand dollars, in addition to the said sum of thirteen thousand dollars, the said Continental Life Insurance Company required your oratrix and orator to date the said notes as of the first day of October, A. D. 1875, although the same were not in fact made until on or about the 30th day of December, 1875, a period of ninety-one days thereafter, and although no part of said sums to be loaned had been paid to your oratrix and orator at the time of the actual making and delivery of said notes, the said company thereby intending to exact and receive from your oratrix and orator interest upon said intended loan before it had, in fact, been made, for the period of ninety-one days, which interest amounts to the sum of twenty-four hundred and sixty-seven dollars and ninety-two cents.

And your oratrix and orator acceded to and accepted said corrupt, unconscionable, and unlawful requirement made by the said company, and then and there, at the time and place before
197 stated of the making and delivery of said notes, agreed to and with the said Continental Life Insurance Company, in and by the same, to pay to the said Continental Life Insurance Company the sum of twenty-four hundred and sixty-seven dollars and ninety-two cents, unlawful and usurious interest, upon the sum of one hundred thousand dollars for the period of ninety-one days, when the said principal was in the hands of said company, and not in the possession nor under the control and disposition of your oratrix and orator, and that the said Continental Life Insurance Company then and there and thereby knowingly agreed to accept and receive the said sum of $2,467.92 as unlawful and usurious interest upon the loan of the sum of one hundred thousand dollars thereafter to be made.

And your oratrix and orator further show that after the delivery of said notes the said sum of one hundred thousand dollars was not, in fact, loaned and advanced to your oratrix by said Continental Life Insurance Company, but that a smaller sum was advanced to her upon said notes.

Your oratrix and orator respectfully show that the said notes were so delivered on or about the first day of January, 1876, and that between said date and the 13th day of January, A. D. 1876, the said Continental Life Insurance Company advanced upon said notes to your oratrix the sum of seventy-two thousand five hundred dollars, as follows:

On January 11th, A. D. 1876, the sum of $58,416.73, and on January 13th, 1876, the further sum of $14,083.27.

And in like manner the said company advanced to your oratrix,

upon said notes, as parts of said loan, the various sums of money hereinafter set forth, and at the various times set after said sums respectively, as follows:

One hundred dollars on or about January 29th, A. D. 1876.

198 One thousand dollars on or about February 3d, A. D. 1876.

Fifteen hundred dollars on or about February 28th, A. D. 1876.

One thousand [and] three and fifty hundredths dollars on or about March 8th, A. D. 1876.

Five hundred dollars on or about March 16th, A. D. 1876.

Five hundred dollars on or about March 17th, A. D. 1876.

Five hundred dollars on or about March 27th, A. D. 1876.

Fourteen hundred [and] twenty-one and sixty-three hundredths dollars on or about March 29th, A. D. 1876.

One hundred dollars on or about April 6th, A. D. 1876.

Five hundred dollars on or about April 10th, A. D. 1876.

One hundred [and] nine and fifty-two hundredths dollars on or about April 15th, A. D. 1876.

Six hundred dollars on or about April 20th, A. D. 1876.

Three hundred dollars on or about April 22d, A. D. 1876.

Five hundred dollars on or about April 25th, A. D. 1876.

Fourteen hundred dollars on or about April 29th, A. D. 1876.

Five hundred dollars on or about May 29th, A. D. 1876.

One thousand dollars on or about May 16th, A. D. 1876.

Eight thousand four hundred and fifty dollars, or thereabouts, at different times after May 16th, A. D. 1876.

Making in all of said last-mentioned sums the aggregate sum of not exceeding $19,984.65, and together with said sums advanced on January 11th, 1876, and on January 13th, 1876, the gross sum of not exceeding ninety-two thousand four hundred and eighty-four dollars and sixty-five cents.

And your oratrix and orator further show that the said sum of ninety-two thousand four hundred and eighty-four dollars and sixty-five cents includes all the moneys which were advanced or loaned to them upon said notes by the said Continental Life Insurance Company.

199 Your oratrix and orator further show that the said contract of loan was made and negotiated with said Continental Life Insurance Company by and through the said defendant, John O. Pierson, who was at the time of said preliminary negotiations, and from thence on, and until long after the delivery of said deed of trust and said notes, and the payment to your oratrix of said various sums of money theron above set forth, the representative and duly authorized financial agent at the city of Chicago, in the State of Illinois, of said Continental Life Insurance Company, and further allege that said Pierson, on behalf of said company, had control of the moneys so advanced by said company, and that he, said Pierson, was the agent for said company in making payments to your oratrix of the principal of said loan.

And in this regard these complainants further allege that said sum of $8,450, last mentioned, was not fully paid by said Pierson as

such agent of said company, but these complainants are unable to state the exact amount thereof which he did so pay to them, nor the times when the same was paid, but they allege that no part of the same was paid on said 16th day of May, 1876, nor until thereafter. And in this behalf these complainants allege that within the past year they made application to said Pierson to obtain from him the dates and amounts of said payments, which he declined to give to these complainants.

And your oratrix and orator further allege that the said Pierson retained or claimed to retain of and from the said loan the sum of five thousand dollars, as a commission to be paid to him by your oratrix and orator for his services in obtaining from his said principal, the Continental Life Insurance Company, the aforesaid loan to your oratrix and orator, whereas the truth is that the said Pierson, in the whole of said transaction, acted as the agent
200 of said company, and not as the agent in any respect of your oratrix and orator, and had no right to exact and receive from your oratrix and orator the said sum of five thousand dollars in said transaction. And in this behalf your oratrix and orator aver, upon information and belief, that the said Continental Life Insurance Company, through its managing officers, had due notice of the fact that said Pierson did not pay said sum of five thousand dollars to your oratrix and orator upon said loan, but retained or pretended to retain the same as a commission for his services in said transaction on behalf of your oratrix and orator, and had due notice that the aggregate of all the sums received by your oratrix on said notes did not exceed the said sum of $92,484.65.

And your oratrix and orator require the said John O. Pierson and the said Continental Life Insurance Company to state what was the actual disposition of said sum of five thousand dollars, whether any, and if any what, amount thereof was actually paid out by said company to said Pierson, or to any other person or officer of said company, and what amount thereof, if any, was conveyed into the treasury of said company, and what amount, if any, was received by said Pierson and any other officer or officers of said company, either from said company or from any other person or persons.

Your oratrix and orator further show that under and by virtue of the statutes of the State of Illinois, in which State the said contract of loan was made and consummated, as above set forth, the said Continental Life Insurance Company, by reason of the unlawful and usurious provisions of said contract of loan, thereby lost the right to demand and receive from these complainants any sum whatever for interest upon the said sums of money so advanced and loaned to them, and the whole interest reserved thereon became thereby forfeited. But your oratrix, Caroline M. Forsyth,
201 hereby offers to refund and pay each of said sums of money so advanced by said Continental Life Insurance Company, with lawful interest on the same, respectively, from the time when the same were received by her, respectively, at the rate of six per centum per annum, up to the first of October, A. D. 1880, and thereafter until the filing of this bill at the rate of ten per centum per

annum, the same to be paid to the legal holder or holders of said notes upon the surrender and cancellation of the same as follows: The sum of $58,416.73, with interest at the rate of six per cent. from January 11th, A. D. 1876, to October 1, 1880, amounting to $16,531,74, and with interest from October 1, 1880, to November 11, 1881, at ten per cent., amounting to $6,506.89, the whole sum of principal and interest aggregating the sum of $81,455.36 *dollars.*

The further sum of $14,083.27, with lawful interest from January 13th, A. D. 1876, to October 1, 1880, amounting to $3,983.19, and with interest from October 1st, 1880, to November 11, 1880, at ten per cent. per annum, amounting to $1,567.71, the whole sum of principal and interest aggregating the sum of $19,635.717.

The further sum of $100, with lawful interest from January 29, 1876, to October 1, 1880, amounting to $28.02, and with interest from October 1st, 1880, to November 1st, 1881, at ten per cent. per annum, amounting to $11.13, the whole sum of principal and interest aggregating the sum of $139.15.

The further sum of $1,000, with lawful interest from February 3, 1876, to October 1, 1880, amounting to $279.51, and with interest from October 1, 1880, to November 1, 1881, at ten per cent. per annum, amounting to $111.38, the whole sum of principal and interest aggregating the sum of $1,490.89.

The further sum of $1,500, with lawful interest from February 28, 1876, to October 1, 1880, amounting to $412.50, and with inter-
202 est from October 1, 1880, to November 11, 1881, at ten per cent. per annum, amounting to $148.50, the whole sum of principal and interest aggregating the sum of $2,061.00.

The further sum of $1,003.50, with lawful interest from March 8, 1876, to October 1, 1880, amounting to $274.61, and with interest from October 1, 1880, to November 11, 1881, at per cent. per annum, amounting to $111.77, the whole sum of principal and interest aggregating the sum of $1,389.88.

The further sum of $500, with lawful interest from March 16, 1876, to October 1, 1880, amounting to $136.16, and with interest from October 1, 1880, to November 11, 1881, at — per cent. per annum, amounting to $55.69, the whole sum of principal and interest aggregating the sum of $691.85.

The further sum of $500, with lawful interest from March 17, 1876, to October 1, 1880, amounting to $136.00, and with interest from October 1, 1880, to November 11, 1881, at ten per cent. per annum, amounting to $55.69, the whole sum of principal and interest aggregating the sum of $691.77.

The further sum of $500, with lawful interest from March 27, 1876, to October 1, 1880, amounting to $135.25, and with interest from October 1, 1880, to November 11, 1881, at ten per cent. per annum, amounting to $55.69, the whole sum of principal and interest aggregating the sum of $690.94.

The further sum of $1,421.63, with lawful interest from March 29, 1876, to October 1, 1880, amounting to $384.07, and with interest from October 1, 1880, to November 11, 1881, at ten per cent. per an-

num, amounting to $158.34, the whole sum of principal and interest aggregating the sum of $1,964.04.

The further sum of $100, with lawful interest from April 6, 1876, to October 1, 1880, amounting to $26.88, and with interest from October 1, 1880, to November 11, 1881, at ten per cent.
203 per annum, amounting to $11.13, the whole sum of principal and interest aggregating the sum of $138.01.

The further sum of $500, with lawful interest from April 10, 1876, to October 1, 1880, amounting to $134.17, and with interest from October 1, 1880, to November 11, 1881, at ten per cent. per annum, amounting to $55.69, the whole sum of principal and interest aggregating the sum of $689.86.

The further sum of $109.52, with lawful interest from April 15, 1876, to October, 1880, amounting to $29.28, and with interest from October 1, 1880, to November 11, 1881, at ten per cent. per annum, amounting to $12.19, the whole sum of principal and interest aggregating the sum of $150.99.

The further sum of $600, with lawful interest from April 20, 1876, to October 1, 1880, amounting to $160.00, and with interest from October 1, 1880, to November 11, 1881, at ten per cent. per annum, the whole sum of principal and interest aggregating the sum of $826.63.

The further sum of $300, with lawful interest from April 22, 1876, to October 1, 1880, amounting to $79.90, and with interest from October 1, 1880, to November 11, 1881, at ten per cent. per annum, amounting to $33.41, the whole sum of principal and interest aggregating the sum of $413.31.

The further sum of $500, with lawful interest from April 25, 1876, to October 1, 1880, amounting to $132.92, and with interest from October 1, 1880, to November 11, 1881, at ten per cent. per annum, amounting to $55.69, the whole sum of principal and interest aggregating the sum of $688.61.

The further sum of $1,400, with lawful interest from April 29, 1876, to October 1, 1880, amounting to $371.23, and with interest from October 1, 1880, to November 11, 1881, at ten per cent. per annum, amounting to $155.95, the whole sum of principal and
204 interest aggregating the sum of $1,927.18.

The further sum of $500, with lawful interest from May 9, 1876, to October 1, 1880, amounting to $131.74, and with interest from October 1, 1880, to November 11, 1881, at ten per cent. per annum, amounting to $55.69, the whole sum of principal and interest aggregating the sum of $687.43.

The further sum of $1,000, with lawful interest from May 16, 1876, to October 1, 1880, amounting to $262.33, and with interest from October 1, 1880, to November 11, 1881, at ten per cent. per annum, amounting to $111.38, the whole sum of principal and interest aggregating the sum of $1,373.71.

And the further sum of $8,450, with lawful interest from May 16, 1876, to October 1, 1880, amounting to $2,216.88, and with interest from October 1, 1880, to November 11, 1881, at ten per cent. per annum, amounting to $941.23, the whole sum of principal and interest aggregating the sum of $11,008.11.

And your oratrix, Caroline M. Forsyth, herewith brings into court and deposits the said various sums, aggregating the sum of one hundred [and] twenty-eight thousand seven hundred and fourteen dollars and nine cents, subject to the lien of said trust deed, and subject to the order and decree of this honorable court in this cause.

And your oratrix and orator further show: That, by deed dated November 10th, A. D. 1881, they conveyed nearly all of the lands covered by and included in the said trust deed to one William W. Green, of the city and State of New York, reserving from such conveyance a portion of said lands aggregating one hundred and sixty acres of the value of about thirty thousand dollars, and described as follows:

Commencing at a point on the east side of the Indiana boulevard, where the centre line of section twenty intersects the same,
205 running thence east along said centre line to the quarter post on the east line of said section twenty; thence southeasterly in a straight line to the southeast corner of the north half of the northwest quarter of section twenty-eight; thence west on the south line of said north half of said northwest quarter of section twenty-eight to the east line of said Indiana boulevard; thence northwesterly along the easterly line of said boulevard to the point or place of beginning, excepting ten and seventy-six hundredths acres taken off from the south end of said tract between said south line thereof and a line parallel thereto.

And excepting also from said conveyance the tract of land belonging to Harriet S. Clarke, which was embraced in the deed of trust to said Pierson by mistake, and is described as follows:

The southeast quarter of the northwest quarter of section seventeen, township thirty-seven north, range nine west, in said county of Lake. And excepting also from said conveyance to said William W. Green five and $\frac{8}{100}$ acres theretofore conveyed to E. A. and C. B. Shedd, in lot one in section one, township 37 north, range ten west, of the second principal meridian, in said county and State.

And that in the said sale to said William W. Green your oratrix agreed to secure and save the said Green, his heirs and assigns, harmless from the lien of said trust deed upon the lands so conveyed to said Green, and your oratrix and orator are desirous of obtaining the immediate release of the lands so conveyed to said Green from the lien of said trust deed, and your oratrix offers to bring or cause to be brought into court and deposited in the registry thereof such additional sum of money over and above the said sums herewith deposited in the registry of said court as your honors may
may consider will, taken together with said sums herewith
206 deposited, and the value of the said one hundred and sixty acres of land not conveyed to said Green, furnish a sufficient security for the claims and demands of the holders of said notes, the same to be deposited subject to the lien of said mortgage, and to answer and discharge whatever decree may be rendered in this cause in lieu of and as a substitute for the said lands so conveyed.

And these complainants — that upon the payment of such additional sum into the registry of said court an interlocutory decree

may be entered, discharging the said lands so conveyed to said Green from the lien of said trust deed, and transferring the said lien to the moneys so deposited in said court.

Your oratrix and orator further show unto your honors that they are unable to state what person or persons is or are now claiming and pretending to be the legal holders of said notes; that sometimes the said Aquila Adams, Axel Dearborn, and Asaph Churchill claim to be the legal holders thereof, and sometimes the said E. A. Dammer claims to be the holder thereof. In this regard your oratrix and orator aver, on information and belief, that the said Continental Life Insurance Company is the actual holder of said notes, and has the same now in its possession; and they further aver, on information and belief, that since the said notes were so delivered to the said Continental Life Insurance Company the said company has always hitherto been and now is the *bona fide* and equitable owner of said notes, and that, whatever changes may have occurred in the actual possession thereof, the said notes have never been sold by said company, nor transferred to any person other than a representative or trustee thereof on behalf of said company. And your oratrix and orator aver that said defendants, Aquila Adams, Axel Dearborn, and Asaph Churchill, and the said E. A. Dammer, in case any or
207 all of them ever had possession of said notes before and at the time of receiving the same, had notice of the usurious contract on which they were made and delivered to said Continental Life Insurance Company, and of the rights and defenses of your oratrix and orator thereto. And your oratrix and orator charge, upon information and belief, that the said Aquila Adams, Asaph Churchill, and Axel Dearborn, and said Dammer, together with the said Continental Life Insurance Company, said John O. Pierson, combining and confederating with each other and with divers other persons, to your oratrix and orator at present unknown, whose names, when discovered, your oratrix and orator pray they may be at liberty to insert herein with apt words to charge them as parties defendant hereto, and contriving how to injure and defraud your oratrix and your orator, pretend that the said Continental Life Insurance Company sold and transferred said notes before maturity to some person or persons having no notice of the usury involved in said notes, whereas in truth and in fact the said company, neither before nor since the maturity of said notes, has made a *bona fide* sale thereof to any one, but in order to defraud your oratrix and your orator, and in the hope of enabling said Continental Life Insurance Company to collect, through the aid and assistance of some of its said confederates, from your oratrix, upon said notes and deed of trust, a larger sum of money than is justly due thereon by the law or the principles of equity, the said company and the said defendants and their confederates give out and make the said pretenses.

Your oratrix and orator further show that they are informed and believe that heretofore, to wit, on the seventh day of February, A. D. 1880, the said Continental Life Insurance Company paid or caused
to be paid the sum of $1,397.62 *dollars* for taxes assessed on
208 portions of the said lands covered by said trust deed, and that

on the 12th day of February, A. D. 1881, the said company likewise paid or caused to be paid the further sum of $1,425.40 *dollars* for taxes assessed on portions of said lands.

Which sums of money, under and by virtue of the provisions of said *trust* deed of trust, your oratrix and orator are required to repay, with interest thereon, respectively, at the rate of ten per centum per annum from said respective dates of payment. And your oratrix hereby offers to pay the said sum of $1,425.40 *dollars*, with interest thereon, amounting to $106.43 *dollars*, in the aggregate amounting to the sum of $1,531.83 *dollars*, and herewith deposits the said amount in the registry of this court in this cause, to be paid to whomsoever of the said defendants shall be entitled to receive the same.

Your oratrix and orator further show unto your honors that on August 29, 1878, the said Continental Life Insurance Company received from your oratrix, by and through Messrs. E. A. and C. B. Shedd, of Chicago, the sum of two hundred dollars, which of right should be applied to the payment of the said indebtedness secured by said deed of trust.

And on November 25, 1878, the said company received from your oratrix the further sum of six hundred dollars, by and through the said E. A. and C. B. Shedd, which should also be applied to the payment of the said indebtedness.

Your oratrix and orator show that the interest upon said respective sums from the date of their respective payment to November 11, 1881, would amount to the sums of $38.39 and $106.60 respectively, which, added to the principal of said payments, would make an aggregate sum of $944.99; but your oratrix and orator aver that the said sum of two hundred dollars were received by said Continental Life Insurance Company at a time when no part of said indebtedness was due, and they aver, on information and belief,
209 that the same was not applied by said company upon said notes, or any or either of them.

And in this behalf these complainants pray that your honors may order and direct the application of said payments, together with lawful interest, in the reduction of the said payment of $1,397.62 above mentioned, made by said company on account of taxes assessed on portions of said lands, as of the date of said payment, February 7th, A. D. 1880. And these complainants show that the principal and lawful interest upon said sums so received by said company from these complainants, from the respective dates of the receipt thereof up to said 7th day of February, A. D. 1880, amount to the gross sum of $860.46, and if deducted from the said payment on account of taxes, as these complainants pray may be done, would reduce the same to the sum of $537.16.

And your oratrix herewith deposits in the registry of the court the said sum of $537.16, with interest thereon, at the rate of ten per cent. per annum, from said 7th day of February, A. D. 1880, to November 11, 1881, amounting to the sum of $9,458, in the aggregate amounting, principal and interest, to the sum of $631.74, to be paid

to whomsoever of the said defendants shall be entitled to receive the same.

And your oratrix also deposits in the registry of the court in this cause the further sum of forty-one hundred [and] twenty-two and $\frac{34}{100}$ dollars to defray the lawful costs and charges of the clerk of said court in the receipt and disbursement of the various sums hereinbefore specified, and such other sums as may be deposited in said court in said cause, and to pay the taxable costs of the said defendants in the said cause, in case they, or some of them, shall produce said notes before this court, and surrender and cancel the same, and receive the sums hereinbefore mentioned as a full satis-
210 faction and discharge of the same and of the indebtedness secured by the said deed of trust.

All which actings, doings, and pretenses of the said defendants and their confederates are contrary to equity and good conscience and tend to the manifest wrong and injury and oppression of your oratrix and orator in the premises.

In consideration whereof and forasmuch as your oratrix and orator are entirely remediless in the premises according to the strict rules of the common law, and can only have relief in a court of equity where matters of this nature are properly cognizable and relievable:

To the end, therefore, that the said Aquila Adams, Axel Dearborn, Asaph Churchill, E. A. Dammer, John O. Pierson, and the Continental Life Insurance Company of Hartford, and the rest of the confederates, when discovered, may severally full, true, direct, and perfect answers make to all and singular the charges and matters aforesaid as fully and particularly as if the same were hereinafter repeated and they separately thereunto interrogated; and that not only as to the best of their respective knowledge and remembrance, but also as to the best of their several and respective knowledge, information, and belief, but not under oath, the oaths of said defendants and each of them being hereby expressly waived; and that the said defendant, John O. Pierson, may be decreed to discharge and release the said deed of trust of record; and that the said defendants, or such of them as has or have the actual possession of said notes, may be decreed to produce the same before this honorable court and surrender the same to these complainants, and that your oratrix and orator may have such further and other relief in the premises as the nature of this case shall require and to your honors shall seem meet:

211 May it please your honors to grant unto your oratrix and your orator the most gracious writ of subpœna of the United States of America to be directed to the said Aquila Adams, Axel Dearborn, Asaph Churchill, E. A. Dammer, John O. Pierson, and the Continental Life Insurance Company of Hartford and the rest of the confederates when discovered, thereby commanding them and every of them at a certain day and under a certain pain therein to be specified, personally to be and appear before your honors in this honorable court, and then and there to answer all and singular the premises, and to stand to, perform, and abide such order and decree

therein as your honors shall seem meet. And your oratrix and your orator shall ever pray.

CAROLINE M. FORSYTH,
By DOOLITTLE & McKEY AND
McDONALD & BUTLER,
Her Solicitors.

JACOB FORSYTH,
By DOOLITTLE & McKEY AND
McDONALD & BUTLER,
His Solicitors.

JOSEPH E. McDONALD,
Of Counsel.
DOOLITTLE & McKEY,
McDONALD & BUTLER,
Solicitors and of Counsel for Complainants.

212 One of said plaintiffs, J. R. Doolittle, Jr., with the defendants and Alfred Bishop Mason, attended at Indianapolis, Indiana, on the 11th of November, 1881. Said bill to redeem was filed by the plaintiffs in the circuit court of the United States for the district of Indiana, and said Mason filed an intervening petition on behalf of the East Chicago Improvement Company in said court, and the sum of $135,000, and the further sum of $75,000 in drafts were deposited in the registry of said court.

The plaintiffs negotiated with said Alfred Bishop Mason a stipulation in said cause, as follows:

IN PL'FF'S EX. 49.

It is stipulated and agreed that no part of the $135,000 paid into the registry of this court under said bill, and no part of the $75,000 paid into said registry under the petition of said intervenor shall be withdrawn without the consent of said Caroline M. Forsyth, unless said petition is dismissed; that upon the granting of said petition the excess, if any, over and above the amount required to be deposited by the court, shall be at once subject to the exclusive control of Caroline M. Forsyth, and that the moneys deposited shall be subject to her order in making offers of payment on her behalf to the holders of the notes secured by the trust deed to Pierson, and said offers shall be made only through the court and entered of record only after due notice to the solicitors of the East Chicago Improvement Company; and neither said deposits nor any part thereof shall be withdrawn or applied to any other purpose until said debt, secured by said trust deed, is paid in full and the lien thereof released from the lands conveyed Nov. 10th, 1881, to William M. Green.

DOOLITTLE & McKEY,
Solicitors for Complainants.
ALFRED BISHOP MASON,
Solicitor for Intervenor.

213 A rule was entered by said court requiring the defendants, among other things, to appear in said court and plead, an-

swer, or demur to said bill and said intervening petition on or before the 7th day of December, 1881.

It was arranged between McDonald & Butler and the plaintiffs that when the clerk of said court should have prepared the necessary number of copies of the said rule said McDonald & Butler should forward the same to the U. S. marshal at Hartford, Conn., and to the U. S. marshal at Boston, Mass., and that the plaintiffs should attend to the service of said rule upon said defendant, John O. Pierson, at Chicago, Ill.

At Indianapolis on the 12th of November, 1881, said plaintiff, J. R. Doolittle, Jr., left the following memorandum addressed to one of the members of said firm of McDonald & Butler:

PL'FF'S EX. 117.

"Mr. George C. Butler.

"DEAR SIR: Axel Dearborn is president of a bank in Boston, Mass.; Aquila Allen is cashier of the bank, and Asaph Churchill is a lawyer and attorney for the bank. E. A. Dammer is a clerk in the same bank. Perhaps you had better mention these facts in your letter to the U. S. marshal at Boston.

"J. S. Parsons is the president of the Continental Life Insurance Company of Hartford, Conn.

"Nov. 12th, 1861.

"J. R. DOOLITTLE, JR."

"P. S.—I have had a subpœna issued in the case of Forsyth *v.* Pierson *et al.* and delivered to the marshal of Indiana this morning."

All of said defendants to said bill to redeem entered a special appearance in said cause. None of them ever answered.

214 On or about the 20th of January, 1882, the plaintiffs were formally discharged by the defendants from their employment as attorneys and solicitors for the defendants without the consent of said plaintiffs.

On the 31st day of March, 1882, a decree was entered in said cause providing as follows:

IN PL'FFS' EX. 49.

Come now the complainants, by McDonald & Butler, their solicitors, and come also the defendants, by William H. Swift and James Buchanan, their solicitors, and show unto the court that the $135,000 deposited in the registry of the court by the complainants and the $75,000 deposited in said registry by the intervening petitioner, The East Chicago Improvement Company, were and are by stipulation filed in this cause at the time of filing the bill and intervening petition herein, payable to the order of the complainant, Caroline M. Forsyth, for the discharge of the notes and the release of the deed of trust in complainants' bill set forth, and the residue after such payment was by said stipulation payable absolutely

to the order of said Caroline M. Forsyth, the only interest of said intervening petitioner in said moneys being that out of it their said lien of said deed of trust should be discharged, it having become the purchaser of the real estate covered thereby; and further show unto the court that complainants and defendants have agreed upon a settlement and adjustment of the matters in controversy between them, and upon a release of said deed of trust and a surrender and cancellation of said notes.

And now, upon motion of said complainants and said defendants, due notice of such motion having been served upon the said intervening petitioner, and proof thereof made, and said intervening petitioner appearing to said motion, by Baker, Hoard & Hendricks its solic-
215 itors, and objecting thereto, it is ordered by the court that out of the money so paid into the registry of this court the sum of one hundred and sixty-two thousand five hundred dollars be paid to William H. Swift, solicitor for the defendants, and the sum of forty-seven thousand five hundred dollars be paid to Caroline M. Forsyth, complainant herein, after deducting from said last-named sum all costs accrued in this cause; and that the said mortgage or deed of trust mentioned be, and the same are hereby, decreed to be fully paid, satisfied, discharged, cancelled, and released, and that the said John O. Pierson, defendant herein, do execute and deliver to complainants a proper satisfaction, piece, or release for record in the proper recorder's office, showing the release, discharge, and satisfaction of said deed of trust.

216 Hypothetical statement No. 4 is as follows:

1.

Upon the following statement of facts assumed to be true as follows, to wit:

In the latter part of July, 1881, Messrs. E. G. and A. B. Mason were engaged in the examination of the title to the so-called Forsyth estate on behalf of Joseph P. Ord, and the plaintiffs were engaged on behalf of the defendants as attorneys in the matter of securing the approval, by said attorneys of Mr. Ord, of the title to said estate.

Mr A. B. Mason stated to one of said plaintiffs, J. R. Doolittle, Jr., that Studdy Leigh and John Petherick had recorded a claim of some sort against the defendants for a large sum of money, and asked said plaintiff what basis or ground the claim had. Said plaintiff stated in reply that the said claim on record had not been made by the defendants, and, of course, could not bind the land; that, as he understood the matter, the claim was for a pretended commission, or a pretended sale of the Forsyth estate by Petherick; that said plaintiff had examined the transaction several months before, and had reached the conclusion that the land was not bound, nor could it be bound, by anything which had transpired in certain negotiations had between the defendant, Jacob Forsyth, Petherick, and his associates; that said Leigh and Petherick had been made defendants to the suit to foreclose the Pierson mortgage, and that the plaintiffs

had ordered a copy of the answer which said Leigh and Petherick had filed in said suit, and that when it was received the plaintiffs would present the same to said Mason. Said plaintiff further stated to Mr. Mason that said defendant, Jacob Forsyth, had executed a power of attorney to said Petherick, but that the power of attorney referred to a letter of instructions bearing the same date, specifying and limiting the mode of its exercise, and that he was in-
217 formed by said Jacob Forsyth that no such letter of instructions had ever been written or signed by him; that the defendant, Mrs. Forsyth, had written a letter to said Leigh, in which it was stated that her husband always acted as her agent in regard to her estate. Said Mason asked of said plaintiff whether the defendants had copies of such papers as they had signed, to which said plaintiff replied that the defendants did not have exact copies of such papers, but that the defendant, Jacob Forsyth, thought he was able to state almost *verbatim* the contents of the power of attorney, and that he had a writing which he believed to be a copy of the letter written by the defendant, Mrs. Forsyth, which, however, was not dated nor signed.

On the first of August, 1881, Amos Allman, an abstract maker of Crown Point, Lake county, Indiana, called at the office of the plaintiffs and had an interview there with said defendant, Jacob Forsyth, and said plaintiff, J. R. Doolittle, Jr., said Allman stating that a suit had recently been commenced in the circuit court of Lake county, Indiana, against the defendants by three parties, one of whom was John Studdy Leigh. Said Allman stated that he had read over the bill sufficiently to ascertain that it was a suit for an injunction against the defendants to restrain them from selling the land, and that said Leigh and his attorney had been at Crown Point, and, as he heard, had applied to the court for an injunction, and that the court had declined to issue an injunction unless the complainants, Leigh and others, should furnish bonds. Said Jacob Forsyth requested said Allman to make a copy of said bill and forward the same to Chicago, and stated to said plaintiff that neither his wife nor himself had been served with a summons in the case.

On the 9th of August the plaintiffs received from McDonald &
Butler a copy of the answer of said Leigh and Petherick in
218 the foreclosure suit at Indianapolis, and directed a son of the defendants to telegraph to said Allman to forward the copy of the bill filed in Lake county. On the 10th of August the plaintiffs received a copy of said bill, and on examining the same found that certain exhibits referred to in the bill were not attached to the copy.

They addressed the following letter to Messrs. McDonald & Butler:

PL'FFS' EX. 59.

'AUGUST 10TH, 1881.

"GENTLEMEN: We learn that J. Studdy Leigh, Charles Edward Tremearne, and Edward Payne, the first two subjects of the Queen of Great Britain, and the last a citizen of Chicago, have filed a bill in

the Lake Co., Indiana, circuit court setting up an equitable title to the property owned by Caroline M. Forsyth by virtue of a contract made to Tremearne by John Petherick Jan. 22, 1881, executed under a power of attorney given him by Jacob Forsyth, and sanctioned by Caroline M. Forsyth, as is claimed. A copy of the bill has been sent us, and Mr. Forsyth wishes the case removed to the Federal court at Indianapolis.

"We expect to make an early application for removal in vacation and will assume to use your names as attorneys for petitioners in connection with our own, unless you notify us by telegraph to the contrary.

"When the cause is removed you will, of course, have charge of it in connection with the mortgage foreclosure.

"It will be more convenient for us to attend to the preparation and execution of petition, bond, etc., than it would it would be for you, on account of the greater accessibility of the parties who are to sign the papers.

"Yours very truly, etc., ——— ———."

219 They received the following reply:

PL'FFS' EX. 60.

"Messrs. Doolittle & McKey, 184 Dearborn —, Chicago.

"GENTLEMEN: Your favor of 10th inst. at hand. Upon removal of the cause named we will be pleased to take charge of it under your advice.

"Yours truly, McDONALD & BUTLER."

On the 11th of August the plaintiffs had a conference with the defendant, Jacob Forsyth, in regard to the removal of said cause from the State court to the Federal court, and prepared a petition for removal and bond and delivered the same to said defendant, Jacob Forsyth.

The plaintiffs also had an interview with Amos Allman in regard to whether the summons in the case had been delivered to the sheriff of Lake county for service, and the plaintiffs advised that under the law of Indiana the suit would not be regarded as commenced by the filing of the complaint, but the summons must first be issued to the sheriff; that until this were done the cause would not be regarded as commenced, and until commenced could not be removed to the Federal court. Said Allman stated that he had been informed by the clerk of the court that the summons had been delivered to the sheriff. The plaintiffs stated to said Allman that on his return to Crown Point he should see the sheriff personally and ascertain from him whether the summons had in fact been delivered to him for service. Said Allman also informed the plaintiffs that when he went to the clerk's office at Crown Point to get the bill in order to make a copy of it he was informed by the clerk that an attorney named Fancher, one of the attorneys of said Leigh and others, had the bill in his possession; that he, Allman, called on Fancher

220 and requested him to return the bill for the purpose of copying, and that said Fancher detached certain exhibits which were attached to the bill and refused to permit said Allman to inspect them.

221 The plaintiffs advised said Allman, on his return to Crown Point, to see the clerk of the court and have him request the said Fancher to return the exhibits to the files of the court, and that when that should be done to make certified copies of the exhibits and forward them to the plaintiffs.

On the 12th of August one of said plaintiffs addressed the following letter to said Allman:

PL'FFS' EX. 61.

"DEAR SIR: You had better ask the clerk to demand from Fancher the return of the exhibits. The sooner the better. If they are returned, please have the clerk make certified copies of them and send them to me. Please make a comparison yourself of the originals and copies.

"In case Mr. Forsyth sends you on the petition and bond, and you find out that the sheriff has the summons, then file bond and petition, and have the clerk proceed at once to make a certified copy of the entire record in the case.

"If the clerk should have any doubts about the right to write up the record at once, please have a talk with Mr. Wood, and refer Mr. Wood to the case of Osgood *v.* Chicago, Danville and Vincennes R. R. Co., U. S. circ. court, N. dist. Ill's, 6 Bissel, p. 330, in which Judge Drummond and Judge Blodgett hold that the petition and bond for removal may be filed in the State court during vacation as well as in term time; that the State court need not act on either the petition or bond; that the record need not be signed by the judge of the State court, and that the attestation of the clerk under the seal of the court is enough. You will have no difficulty. I want the copy of the record, in case the petition is filed, made at once, at the earliest possible moment. In the meantime get me copies of exhibits attached to Leigh's bill, if you possibly can.

"Yours very truly, etc. —— ——."

222 On the 15th of August one of said plaintiffs addressed another letter to said Allman as follows:

PL'FFS' EX. 63.

"DEAR SIR: I herewith enclose you petition and bond to be filed with the clerk of the circuit court of Lake county, Indiana, in case you learn that the summons is in the sheriff's hands.

"I hope you have been able to get the exhibits back into the hands of the clerk. I want the certified copies as soon as possible.

"After the clerk has made the certified copy of the record of the case have him forward it at once to the clerk of the U. S. circuit court at Indianapolis and notify me, and also drop a line to Messrs. McDonald & Butler, Indianapolis.

"Let the clerk notify you as soon as he can what the costs are, and I will send it to you to be paid to him.

"Yours very truly, etc. —— ——."

On the 15th of August Mr. A. B. Mason telephoned the plaintiffs, stating that he had heard that a suit had been brought against the Forsyths and the land in Lake county, Indiana, and asked if the plaintiffs were informed in regard to the matter. The plaintiffs replied that they had heard about the filing of the bill, and had a copy of the bill itself, but not of certain exhibits which had been attached to it; that an attorney of the complainants had taken the exhibits from the files, that they had made arrangements to secure the return of the papers, and that when they were received a copy of the bill and of the exhibits would be furnished to Mr. Mason, which they expected would be done in a very few days.

Late in the evening of the 15th of August the plaintiffs received the following dispatch:

223 PL'FFS' EX. 62.

"CROWN POINT, IND., —— 15, ——.

"To Doolittle & McKey, Chicago,

"Care J. R. Doolittle, Jr., 24 Groveland Park.

"Fancher refuses to give up the papers.

"AMOS ALLMAN."

On the 16th of August the defendant, Jacob Forsyth, stated to the plaintiffs that he had received a letter from said Allman, stating that Fancher refused to deliver the exhibits. Said plaintiff, J. R. Doolitttle, Jr., and Jacob Forsyth had a long interview in regard to the condition of the suit against the Forsyth estate. Said plaintiff stated that the attorney of said Ord had learned of the filing of the bill; that it was evident from the course pursued by the attorney of said Leigh and others that their plan was to cloud the title in such a manner as to compel the defendants to pay liberally in order to remove their cloud; that the bill which was on the files of the court contained a very dangerous allegation, charging that both the defendants had, in writing, authorized said Petherick to sell and convey the property, and that he had made a contract of sale under such power; that if Leigh and his associates should spirit away the exhibits, of which the defendants had no exact copies, they would be left in a very difficult position in the matter of securing the approval of the title; that if they were unable to obtain the exhibits, or true copies of them, so as to convince said Mason that the statements made to him of their contents and effect were correct and true, there was great probability that he would feel obliged to reject the title, and that the proposed sale to Joseph P. Ord would fail utterly on that account.

Said plaintiff requested said defendant, Jacob Forsyth, to
224 send a telegram to said Amos Allman, to the effect that if the

petition for removal and the bond had been filed in court said plaintiff would see said Allman the next day.

On the 17th of August the said plaintiff went to Crown Point, prepared and obtained affidavits from Amos Allman and the deputy clerk, George I. Maillet; prepared a demand and delivered the same to said Maillet with instructions to serve the same on said Fancher.

On the 18th of August the plaintiffs advised the defendants that the petition for removal had been filed, that the cause was now pending in the U. S. court, and that a motion should be made before the Federal court requiring the complainants in the suit to restore the exhibits, and that in default thereof the bill should be dismissed; that the State court was not in session at the time, and no order could be obtained from the State court; that the attorney, Fancher, might probably be indicted under the State law for spoliating the files of the court, but that such prosecution would consume considerable time, and that it would not be at all certain that it would enable the defendants to obtain copies of the exhibits, and advised the defendants that the motion should properly be made before the circuit court of the United States, at Indianapolis, and that probably McDonald & Butler had better attend to it.

On the 18th of August the plaintiffs addressed the following letter to McDonald & Butler:

PL'FFS' EX. 64.

"AUGUST 18TH, 1881.

"GENTLEMEN: I was at Crown Point yesterday, and prepared the enclosed affidavits of Amos Allman and George I. Maillet.

"The petition for the removal of the cause was filed on August 16. The clerk will prepare the certified copy of the record,
225 and it will be forwarded to you by Messrs. Wood & Wood, att'ys-at-law, of Crown Point.

"As soon as you receive the record please file it in the U. S. circuit court, and please present the enclosed affidavits to the judge and get the proper rule.

"It may not be amiss if I give you a statement of some of the surroundings of the case.

"Certain English parties were negotiating with Forsyth for nearly a year in regard to the purchase of the Forsyth estate in Lake Co., but they had no money and could do nothing. They had an idea that by a stock-jobbing operation they could put the land on the market in London.

"The matter ran along until the latter part of Dec., 1880, the English parties failing from period to period to close anything, simply promising from time to time, and as regularly breaking their word. Finally, in Dec., 1880, Jacob Forsyth gave a power of attorney to John Petherick authorizing him to make a sale of the lands, under a letter of instructions, which was never sent, nor even prepared.

"Forsyth was unable to agree with Studdy Leigh, the representative here, as to the conditions of the sale, and the whole matter fell through. On Jan. 28, 1881, Forsyth served on Petherick in London

a revocation of all his powers. The pretense now set up is that on Jan. 22, 1881, Petherick made a contract of sale with Tremearne, for himself and as trustee for Leigh and a man named Payne for the 8,000 acres at $140 per acre, or $1,120,000. As a matter of fact the power of attorney was nugatory, because the limitations of its exercise were never agreed upon. In the next place, it could not bind the land, for the fee was in Caroline M. Forsyth and not Jacob Forsyth, and her name was never signed to any of the papers,
226 either by herself or by her husband.

"Under these circumstances, Leigh, Tremearne, and Payne, who are worthless, filed a bill asking a specific performance of the contract made by Petherick, and asked for an injunction to restrain Forsyth and wife from selling the land. Of course they could not furnish bonds for property which they alleged was worth $1,120,000. I understand that they annexed to their bill the original papers, and filed them. When I heard of the suit I ordered a copy of the complaint, and there the attorneys of the plaintiffs—at least the one at Crown Point—tore the exhibits off from the complaint. I know from what Mr. Forsyth tells me that he can state almost exactly the contents of the power of attorney and a letter written by Mrs. Forsyth, but I want the originals, or copies thereof, made after a personal inspection of the originals.

"Mr. and Mrs. Forsyth have given to other parties an option in writing to take the lands at one million dollars, which transaction the Leigh crowd have got wind of, and their suit was commenced in the hope of being paid something as blackmail. The stealing of the exhibits from the court files is a fair criterion of the morality of the claim. You will please consider the contract of sale by the Forsyths as a confidential matter. No public mention has been made of it yet.

"I think that under the act of March 3, 1875, chap. 135, sect. 7, power is conferred on the Federal court to dismiss the bill in case the exhibits are not produced.

"But inasmuch as the Federal court has obtained jurisdiction of the cause, and the parties, by the filing of the petition for removal and bond in the State court, — I think that the general chancery jurisdiction would give us the right to have the papers produced, from the fact that they were removed by the parties complainant or their agent.
227 "It would not be competent for the Federal court to compel the complainants to file the papers again in the State court, but inasmuch as they have the papers in their possession, and are before the court, and as they are a part of their bill by the very terms thereof, I think they may be compelled to deliver them up, on pain of a dismissal of their suit.

"I have drawn the form of an order, which I wish the court would sign, or something similar to it. Two copies of it and of the affidavits should be sent to Wood & Wood, Crown Point, Ind., for service on Thaddeus I. Fancher, and two copies should be sent to me for service on Francis DePfuhl, Chicago.

"I want the return day of the rule made as early as practicable, for

the reason that the examination of the title to the property requires the sifting of this matter at once. I would suggest August 29th as the return day. Another reason why an early day should be fixed is that the defendants cannot know the contents of the bill in its present shape, and cannot plead to it understandingly.

"In case the complainants produce the papers in response to the rule, it is my present opinion that Mrs. Forsyth can demur to it, because the bill seeks to charge her in relation to a contract relative to real estate, and the bill shows no note or memorandum in writing signed by her or by any one by her authorized. In fact, her name has never been signed to any of the papers, except to a letter in which she stated that Colehour was not her agent, but that her husband always acted for her.

"I hope you will give this matter your early and urgent attention. The suit is a blackmail affair, but Mr. Forsyth does not propose to bleed a dollar. It is an annoyance merely, but it might, perhaps, have some weight with the parties with whom he is dealing, and for this reason we want it brought to a focus at the earliest
228 possible moment.

"I trust that my letter, the bill, and the affidavits will enable you to get the real bearings of the matter at once.

"Yours truly, J. R. DOOLITTLE, JR.,
"*For Doolittle & McKey.*

"Messrs. McDonald & Butler, Indianapolis, Ind."

To which the following reply was received by the plaintiffs:

PL'FFS' EX. 65.

"INDIANAPOLIS, IND., *Aug.* 19, 1881.

"J. R. Doolittle, Jr., Esq., 184 Dearborn St., Chicago.

"DEAR SIR: Your favor of yesterday with enclosed affidavits rec'd. The record has not yet come to hand. Judge Gresham (of our U. S. court) is East, and will probably not return before the first of Sept. If Judge Drummond is at Chicago it might be best, if you deem the matter one of urgency, to apply to him for the order. We will file, or at least tender the record for filing, as soon as it comes, but it may be a question whether the record can be filed without an express order of the court before the term to which the removal is taken, viz., the Nov. term in this case. We will notify you as soon as the record is rec'd.

"Yours truly, McDONALD & BUTLER."

229 On the 20th of August the plaintiffs called upon the Honorable Thomas Drummond, stated to him that Judge Gresham was absent from the district of Indiana, stated to him at some length the facts touching the abstraction of said exhibits, and requested him to consent to hear a motion in the cause. Judge Drummond stoted that he preferred not to hear motions of that character unless it was important to protect the rights of parties. The plaintiffs stated to said judge that they were at that time engaged in securing

the approval of the title to the Forsyth estate by Messrs. E. G. & A. B. Mason, and that they feared, unless the complainants would restore the exhibits, the plaintiffs would be unable to secure the approval of the title; that under certain contracts which had been made the title must be approved or rejected before the 10th of September, 1881, and that it was a matter of great importance to said defendants, the Forsyths, to obtain copies of the exhibits before that time. Judge Drummond consented to hear a motion in the cause provided a reasonable time should be given to the solicitors of the complainants, and that if the cause appeared to be one proper for removal to the Federal court he would order it to be docketed, and would enter such order as would seem to be justified by such facts as might appear upon the hearing of the motion.

The plaintiffs on the 20th of August wrote the following letter:

PL'FF'S EX. 66.

"AUGUST 20TH, 1881.

"GENTLEMEN: Your favor of the 19th is at hand. I have seen Judge Drummond, and he will entertain a motion in the absence of Judge Gresham.

"When the record reaches you from Lake county please file it in the U. S. circuit court.

"If Judge Gresham is absent and will not return before
230 Sept. 1 please have an affidavit to that effect made by the clerk of the court or by some person cognizant of the facts, and send that affidavit and the affidavits of Allman and Maillet to me. I will give notice here and have the motion decided by Judge Drummond. I shall want a copy of the record as filed in the U. S. circuit court, certified by the clerk of the U. S. court, with a certificate of the date of filing. The judge wants that done to show whether it is a proper case for removal, and that the court has acquired jurisdiction. If necessary he will make an order docketing the cause.

"I will make copies of affidavits, notices, etc., here, and will cause them to be served from here. If the motion is to be made before Judge Drummond I want it done with all possible dispatch. The clerk at Indianapolis ought to push through the copying of the record.

"Now, in case Judge Gresham will return before Sept. 1 it may be advisable to await his arrival, but I do not want to lose the ten days; I would sooner have it consumed in the running of the notice.

"I think you are mistaken as to the question of the term of court to which the removal case must be presented. Tremearne *el al. v.* Forsyth *et al.* is not a common law case, but a chancery case, and the equity terms of the U. S. court begin the first Monday of every month.

"The petition for removal was filed Aug. 16, just 20 days before the next equity term, and under the act of Congress we must file the record within the 20 days, as I understand it. One ground for the

proposed order on the complainants is to enable the petitioners to comply with the terms of their bond.

"The petition and bond having been filed in the State court the jurisdiction of the Federal court attaches.

231 "The law gives the petitioner until the next term of court in which to file the certified copy of the record, but that is a limitation or requirement imposed on the petitioner. It does not prohibit the filing of the record before the expiration of the period. The filing at an intermediate time is a compliance with the law and the bond.

"In case the petitioner, having filed the record before the cour thas been reached, seeks an order from the court, it might be a proper thing for the court to require him to notify the adverse party of the fact that the record had been filed, so that, upon the hearing of the motion, such adverse party could be prepared to contest the propriety of the removal and the jurisdiction of the court. But the court having jurisdiction of the cause will grant all necessary orders to protect the rights of parties. Judge Drummond tells me that such has been the practice, and it stands to reason, for no other court can grant any order at all.

"Mr Forsyth is quite anxious to have this matter pushed. When you ascertain the costs, please pay them, and notify me of the amount and I will remit

"Yours, very respectfully, J. R DOOLITTLE, JR.

"Messrs. McDonald & Butler, Indianapolis, Ind."

The plaintiffs also telegraphed McDonald & Butler.

The plaintiffs received the following letter:

PL'FFS' EX. 68.

"INDIANAPOLIS, IND., *Aug.* 20, 1881.

"Messrs. Doolittle & McKey, Chicago.

"GENTLEMEN: The transcript has been received from Messrs. W. & W. Under our practice it cannot be filed, except by
232 special order of the court, before the first day of the November term; *i. e.*, Nov. 1st, '81.

"Your telegram just rec'd. Will get letter as per advice.

"Yours, truly, McDONALD & BUTLER."

On the 23d of August the plaintiffs telegraphed McDonald & Butler, and again on the 24th.

On the 24th of August the plaintiffs received the following letter:

PL'FFS' EX. 67.

"INDIANAPOLIS, IND., *Aug.* 23*d*, 1881.

'Messrs. Doolittle & McKey, Chicago, Ills.

"GENTLEMEN: Your favor of 20th rec'd Sunday and your telegram of to-day rec'd.

"It has been the uniform practice of our court here, when it was desired to take action at once in a transfer case, to order the case

filed and docketed on the presentation of the record, if it appears a proper case for removal. In the temporary absence of the clerk his deputy did not feel authorized to file the record, and we think, ourselves, that the best course will be to present the transcript of the State court record to Judge Drummond, and, upon motion, he can order it filed and docketed, and then make such order as is required. For that purpose we enclose the record and the affidavits you sent us, as requested.

"It is not known, even by his family, when Judge Gresham will return.

"Yours, truly, McDONALD & BUTLER."

The following letter was sent in reply:

233 PL'FFS' EX. 69.

"AUGUST 24TH, 1881.

"GENTLEMEN: Your favor of yesterday enclosing certified copy of record and affidavits of Allman and Maillet was delivered unusually late; there must have been an uncommon delay in our post office.

"I see that the clerk has made a bungle of the record, and I shall go to Crown Point in the morning, have it straightened out, and serve Fancher while I am there; the next morning I will serve De Pfuhl here.

"I shall make the motion for Aug. 31, and I hope to get a satisfactory order on the other side.

"I will keep you posted of the matter from time to time.

"Yours, very truly, J. R. DOOLTTLE, JR.,
"For DOOLITTLE & McKEY.

"Messrs. McDonald & Butler, Indianapolis, Ind."

On the 25th of August one of said plaintiffs went to Crown Point, Indiana.

The clerk made a proper certificate as to the transcript of the record of said cause, and said plaintiff served upon said attorney, T. S. Fancher, the notice of motion in said cause.

Said plaintiff held a long interview with said Fancher, in which he stated to said Fancher that the defendants were determined that the exhibits which Fancher had abstracted from the files in said cause should be returned, and that the matter should be thoroughly prosecuted to the full limit of the law until that result was brought about. During said interview said Fancher promised said
234 plaintiff that he would restore said exhibits to the files of the court. Said plaintiff, in the office of said Fancher, made a careful copy of each of said exhibits, and then accompanied said Fancher to the deputy clerk of said Lake county and saw the said exhibits returned to him. Said plaintiff directed said deputy clerk to make a supplemental record in said cause, and to deliver the same to said Fancher at the expense of the defendants. Said plaintiff further arranged with said Fancher that when said supplemental record should be made and delivered to him by said clerk he should forward the same to his associate in said cause, Francis

DePfuhl, in order that it might be presented before Judge Drummond on the hearing of said motion.

On the 26th of August said plaintiff took a copy of said bill and of said exhibits to Mr. A. B. Mason, and discussed with him at length the bearing of said suit upon the title to the Forsyth estate. Said bill and exhibits are as follows:

PL'FFS' EX. 54.

STATE OF INDIANA, } ss:
Lake County, }

In the Circuit Court.

CHARLES EDWARD TREMEARNE, JOHN STUDDY LEIGH, and EDWARD PAYNE
vs.
CAROLINE M. FORSYTH and JACOB FORSYTH.

To the Honorable Elisha C. Field, judge of the circuit court of the thirty-first circuit:

Charles Edward Tremearne and John Studdy Leigh, of London, in England, and Edward Payne, of Chicago, in the State of Illinois, plaintiffs, complaining of Caroline M. Forsyth and Jacob Forsyth, of the said county of Lake, in the State of Indiana, respectfully show unto this court that on or about the 31st day of December, A. D. 1880, being (or claiming and pretending to be) seized and possessed, as your orators are advised and believe, of the real estate and
235 property hereinafter more particularly described, the said defendants, by a power or warrant of attorney, dated on the day last aforesaid, and signed, sealed, and acknowledged by the said Jacob Forsyth for himself and the said Caroline M. Forsyth, his wife, and duly confirmed by said Caroline M. Forsyth by an instrument in writing dated on the day last aforesaid, and signed by said Caroline M. Forsyth, authorized, directed, and empowered one John Petherick, of said London, for said defendants and in their names, places, and steads, to sell and convey the said real estate and property and make, execute, or contract with the purchaser or purchasers thereof, as will more fully and at large appear, the said power of attorney and instrument confirming the same, which these plaintiffs will produce on the trial hereof, and which are hereunto annexed and made part hereof; and the said plaintiffs, further complaining, show that the said John Petherick, in pursuance and by virtue of the power, direction, and authority aforesaid, did sell the said real estate and property, and did make and execute and deliver an agreement or contract of sale for the same to Charles Edward Tremearne, one of the said plaintiffs, who, in and by said agreement, undertook, promised, and agreed to buy said real estate and property for and in behalf of himself and his coplaintiff, as will in and by said agreement more fully and at large appear, the same being hereunto annexed and made a part of this complaint; these plaintiffs will produce the same on the trial of this cause.

The said plaintiffs further show that in and by said agreement the stipulated price or consideration for said real estate, to be paid by said plaintiffs to said defendants, was one hundred and forty dollars per acre for each acre of land, and including about two hundred acres, which form a sheet of water known by the name of Lake Berry, as follows: Two hundred and fifty thousand dollars
236 on or before the first day of July, A. D. 1881; five hundred thousand dollars after the issuing of certain certificates of share or warrants by these plaintiffs, and the balance of said purchase price or consideration as soon as the exact acreage of the said real estate shall have been ascertained by measurement, provided, always, the title to the same shall have been first examined by said plaintiffs or their counsel learned in the law, and found perfect and absolute in the said defendants, which said agreement bears date on the 22 day of January, A. D. 1881, and is duly signed and sealed by said John Petherick for and in behalf of said defendants, and by the said Charles Edward Tremearne for and in behalf of these plaintiffs, and in which said agreement the said real estate and property are mentioned and described as that certain tract of land called the Sheffield or Forsyth estate, consisting of eight thousand acres of land, be the same more or less, and situate and being in Lake county, in the said State of Indiana.

(Omitting the description of the lands.)

These plaintiffs further represent that they have always been willing and ready to carry out the said agreement and comply with the terms thereof, and have requested and demanded of said defendants that they should remove, satisfy, cancel, or otherwise clear their said title from such incumbrances as are valid and existing liens thereon, and which cloud their said title, and these plaintiffs say that they are advised and believe there are large incumbrances on said property, one of which consists of a mortgage now in suit in the United States circuit court for the district of Indiana, in which said suit the holders of such mortgage claim nearly $200,000 *dollars*, and ask for foreclosure and sale, and that unless the said defendants pay, settle, compromise, or satisfy the claim of said mortgage holders, or permit these plaintiffs to do so and to
237 have whatever sum of money may be required for that purpose deducted from the said purchase price or consideration on their said agreement contained, the said real estate and property is in great danger of being sacrificed and taken from the plaintiffs, who are now justly and equitably entitled to the same.

These plaintiffs further say they have long before said first day of July, A. D. 1881, and on that day and hitherto and still are ready and willing, and hereby offer to carry said agreement into effect, and to do and perform all and singular all the matters and things which they, in equity or good conscience, ought or should do and perform in the premises, and would long since have paid the said first installment of two hundred and fifty thousand dollars, but that the said defendants utterly refuse to carry out or comply with the said agreement or to remove said incumbrance or to permit the plaintiff to have said property measured so as to ascertain the exact

acreage thereof, and have entered into an agreement with the Belt Line Railroad Company, of Chicago, Illinois, for the sale and conveyance of said real estate and property to said company, as plaintiffs have been informed and verily believe.

These plaintiffs further say that they have been informed and verily believe and so charge the fact to be: That the said defendants, being in expectation and fear of the beginning of a suit by these plaintiffs against them for the performance of said agreement, and anticipating the issuing of an injunction restraining said defendants from selling or conveying said property to any person or persons other than the plaintiffs, are making all possible haste to consummate such sale and conveyance to said railroad company, and will, unless immediately restrained by the writ of injunction issued by this honorable court, convey the said property and place it beyond the power of these plaintiffs to recover and obtain the same, and thereby cause great and irreparable loss and
238 damage to these plaintiffs.

These plaintiffs further say: That it is not safe for them to pay as large a sum of money as shall be required for the satisfaction and extinguishment of said mortgage unless the said defendants are willing to accept and credit these plaintiffs with such payment upon the said purchase price and deduct the same therefrom, nor can these plaintiffs ascertain the precise amount required for such satisfaction because of the fact that said defendants defend said foreclosure suit and deny the plaintiffs' claim in said suit of foreclosure, or at least a great portion thereof.

These plaintiffs cannot account for the refusal of said defendants to carry out their said agreement with these plaintiffs, as in justice, fairness, equity, and good conscience they ought to do, but these plaintiffs believe that since the making and executing said contract the said real estate has risen in value and is worth more than one hundred and forty dollars per acre, and that said defendants have been offered and expect to get a higher price from said Belt Railroad Company than the said purchase price in said agreement contained; and these plaintiffs had well hoped and believed that said defendants would faithfully perform their said agreement, and were not aware and had no suspicion of any endeavors and attempts of said defendants to sell said real estate to said railroad company and were still negotiating and endeavoring to get said defendants to honestly and conscientiously comply with the terms of their said agreement until within a few hours last past, when these plaintiffs were informed and made aware that said defendants are about to convey said premises to said company, and these plaintiffs say the said defendants will so sell and convey said premises within the next twenty-four hours unless restrained as aforesaid.

239 Wherefore these plaintiffs pray the writ of injunction to issue out of this court, enjoining and restraining the said defendants from selling, conveying, further encumbering, or otherwise disposing of the said real estate, and that on the hearing of this cause the said plaintiffs may be permitted to pay the said purchase price, and the said defendants be compelled upon such pay-

ment being made to them to convey said premises to these plaintiffs free and clear from all incumbrances and to carry out and perform said agreement, and that said plaintiffs have such further or other relief or judgment as may be just and equitable in the premises.

CHARLES EDWARD TREMEARNE
By FRANCIS DEPFUHL, *His Attorney.*
JOHN STUDDY LEIGH.
EDWARD PAYNE,
By FRANCIS DEPFUHL, *His Att'y.*

STATE OF ILLINOIS, } ss:
Cook County, }

John Studdy Leigh, being duly sworn upon his said oath, deposes and says: He is one of the plaintiffs in the foregoing complaint named; that he has read said complaint and knows the contents thereof, and that the same is true.

JOHN STUDDY LEIGH.

Subscribed and sworn to before me, this 27th day of July, A. D. 1881.

[SEAL.] W. T. WENTWORTH,
Notary Public.

Power of Attorney.

Know all men by these presents that I, Jocob Forsyth, of the town of Sheffield, county of Lake, in the State of Indiana, has made, constituted, and appointed, and by these presents does make, 240 constitute, and appoint, John Petherick, Esq., F. G. S., of the city of London, county of Middlesex, and Kingdom of Great Britain, true and lawful attorney for me, and in my name, place, and stead, to sign a preliminary contract of sale of the lands known as the Sheffield or Forsyth estate, in Lake county, and State of Indiana, belonging to me, consisting of eight thousand acres, more or less, at the rate of one hundred and forty dollars ($140) per acre, United States currency, on such other conditions as will appear in a letter of instructions of even date herewith addressed by me to the said John Petherick, specifying terms of payment, delivery of conveyance, and the like, this power to be good until the first day of February, 1881, giving and granting unto John Petherick, said attorney, full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully, to all intents and purposes, as I might or could do if personally present at the doing thereof, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or his substitute, duly appointed by him, shall lawfully do or cause to be done by virtue hereof.

In testimony whereof I have hereunto set my hand and seal, this 13th day of December, 1880.

JACOB FORSYTH. [SEAL.]

Signed, sealed, and delivered in presence of—
LYMAN M. PAINE.

241 SHEFFIELD, *Dec.* 31, 1880.

Studdy Leigh, Esq., Sherman House, Chicago.

DEAR SIR: My husband, Jacob Forsyth, informs me that you received a note to-day from C. W. Colehour, saying some of the promoters in London, for the sale of the large tract of land near Chicago, "had cabled him to-day to see you in relation to it." I am also informed you received a cable from London to-day from one of the promoters, stating that Colehour had represented himself as my agent. It is almost unnecessary for me to say that this last assertion is untrue. Yet, as it would appear to discredit the position of my husband in his relations with you, Mr. Payne, and Mr. Petherick, I will repeat that there is not one word of truth in its statement, and that in our joint interest in this property my husband invariably represents my interest as well as his own, and that in all negotiations looking to its sale or management in any way it is not my habit to negotiate directly with the parties or sign papers.

I am aware that when the property is sold I will necessarily sign the deed in company with my husband, which I know to be an invariable rule of law in this country, in order to convey a good title to the property.

Yours truly, CAROLINE M. FORSYTH.

STATE OF INDIANA, }
Lake County, } *ss:*

Francis DePfuhl, being duly sworn, says the foregoing is a true, correct, and literal copy of an original letter signed by Caro-
242 line M. Forsyth, and now in this affiant's possession at Chicago, Illinois.

FRANCIS DEPFUHL.

Subscribed and sworn to before me this 28th day of July, 1881.

THAD. S. FANCHER,
Notary Public.

Articles of agreement made and entered into this twenty-second day of January, one thousand eight hundred and eighty-one, between John Petherick, of No. 68 Tavestock Crescent, in the county of Middlesex, for and on behalf of Caroline M. Forsyth and her husband, Jacob Forsyth, of Sheffield House, Lake county, in the State of Indiana, one of the United States of America, hereinafter called the vendors, of the one part, and Charles Edward Tremearne, of Wallbrook House, in the city of London, financial agent on behalf of a company which has been duly organized and called the East Chicago Land and Dock Company, hereinafter called the company, of the other part.

Whereas the vendors are the owners of a tract of land called the Sheffield or Forsyth estate, consisting of eight thousand acres of land, more or less, situate in the aforesaid county and State; and whereas by a power of attorney dated the thirty-first December, one thousand eight hundred and eighty, signed by the said Jacob Forsyth, and ratified on the same day by letter by his wife, the said

Caroline M. Forsyth, the vendors authorized the said John Petherick to sign a preliminary contract on their behalf for the sale of said estate; and whereas by a letter signed by the said Jacob Forsyth on the 28th day of October, one thousand eight hundred and eighty, certain terms and conditions of the said sale were set forth:

243 Now these presents witness: That for the considerations and on the times hereinafter expressed the vendors, for themselves, their successors and assigns, do hereby covenant with the said Charles Edward Tremearne, his executors, administrators, and assigns, and agree to covenant with the company, their successors and assigns, and the said Charles Edward Tremearne, that the company thus constituted shall, for themselves, their successors and assigns, covenant and agree in the manner following—that is to say:

1st. The vendors agree to sell their said estate to the company for the sum of $140 (one hundred and forty dollars), United States currency, per acre of land, including about two hundred acres which form a sheet of water known by the name of Lake Berry.

2d. The company shall and will pay for the said estate, after the title of the same have been duly examined and found correct by a counsellor-at-law, to be appointed by said company for that purpose, in the manner following—that is to say:

The sum of $250,000 (two hundred and fifty thousand dollars) within one month after the shares of the company are alloted.

The further sum of $500,000 (five hundred thousand dollars) in fully paid up shares or share warrants of the company, at par, so soon as its shares are printed and issued to the public.

And, lastly, the further sum of $250,000 (two hundred and fifty thousand dollars), or whatever the exact balance may be after the exact acreage of the said estate is ascertained by measurement, always provided the titles to the said estate have been examined and found perfect, in the said fully paid up shares or share warrants of the company at par.

3d. The extreme limit of time allowed by the vendors for the payment of the first installment by the company shall be the first day of July next, and should the said installment not be paid on or before that day this agreement shall be null and void.

244 4th. After the inspection and approval of the estate by an engineer appointed by the company to examine the same a formal contract shall be drawn up with the above-named conditions and signed by the vendors and a duly authorized representative of the company.

In witness whereof the aforesaid parties have hereunto set their hands and seals, in the year and on the date above written.

JOHN PETHERICK. [SEAL.]
C. E. TREMEARNE. [SEAL.]

In consideration of one dollar to me in hand paid, the receipt whereof is hereby confessed, I, Charles Edward Tremearne, do hereby sell, assign, transfer, and set over unto ——— ——— all my right, title, interest, claim, demand, property, and estate in and to the foregoing agreement, and the land and real estate therein described.

Witness my hand and seal, at Chicago, Illinois, this 25th day of July, A. D. 1881.

C. E. TREMEARNE, [SEAL.]
By J. STUDDY LEIGH,
His Attorney-in-Fact.

In presence of—
FRANCIS DEPFUHL.

245 Said plaintiff, J. R. Doolittle, Jr., called the attention of said Mason to the copy of the bill and the exhibits, and stated to him that, in his judgment, the land was not bound by any of the papers which had been executed. Said Mason examined with care the letter of Dec. 31st, 1880, written by Mrs. Forsyth, and stated that he regarded the letter as a declaration on the part of Mrs. Forsyth that she had ratified or would ratify whatever contract or agreement her husband might make touching the sale of the land, and that he was in doubt somewhat as to the construction which the court might place upon that writing. Said plaintiff, in reply, stated to said Mason that the letter in question was addressed to Studdy Leigh, and not to John Petherick, and that Petherick could not claim that said letter conferred any authority upon himself from Caroline M. Forsyth, and stated to said Mason that the contract between Petherick and Tremearne had not been executed by Petherick in the names of Jacob Forsyth and Caroline M. Forsyth, and, for this reason, could not be regarded as their contract, and, furthermore, that even if the defendant, Mrs. Forsyth, had executed the power of attorney with her husband, and Petherick had executed a contract in her name, it would be nugatory and void, because it was not executed in pursuance of a letter of instructions bearing date Dec. 31st, 1880; but, on the contrary, the contract between Petherick and Tremearne recited that it was executed in pursuance of a letter of instructions under date of October 28, 1880, and that, therefore, the said contract defeated itself by its own recitals, for it contained evidence within itself that it was not only not executed by the authority of the defendants, but that it was executed without their authority.

Said Mason stated to said plaintiff that he would give the copies of the bill and the exhibits his examination, and would re-
246 port his conclusion later.

On the same day the said plaintiff had another interview with said Mason, in which he stated that he had concluded to advise Mr. Ord and his associates to disregard the claim set up in said suit by Tremearne, Leigh, and Payne, and asked said plaintiff what course he intended to pursue in regard to the disposition of said suit. Said plaintiff responded that he intended to demur to the complainant's bill, and that he would endeavor to bring on the demurrer for argument at an early day and have it disposed of. Said Mason stated that, while he had become convinced that the claim set up in the bill did not affect the title to the land, still that he was assuming a great responsibility in advising his clients to disregard such claim before it had been passed upon by the court; that if the court should

not sustain a demurrer to the bill, but require the Forsyths to answer, the matter might be left in litigation for several years.

On the 27th of August the plaintiffs communicated with Judge Drummond, notifying him that the motion in said cause had been noticed for the 31st of August, and asked him whether he would be able to hear it at the time fixed in the notice, to which the judge responded that he would hear the argument.

On the 29th of August the plaintiffs prepared a form of order to be submitted to Judge Drummond on the hearing of the motion.

On the 31st of August the motion in said cause was brought on before Judge Drummond by the plaintiffs, the complainants in said suit being represented by Francis DePfuhl, who raised a question as to the propriety of the removal of said cause from the State court to the Federal court. Judge Drummond stated that the papers in the case presented a proper case for removal, and that he would entertain jurisdiction and would enter an order docketing the cause.

247 The plaintiffs stated to Judge Drummond that it was their intention to demur to the bill, and that they had had a conference with Mr. DePfuhl upon the subject, and he had stated that it would suit his convenience better, and he very much desired that Judge Drummond should hear the argument of the demurrer. Judge Drummond stated that he would probably be able to do so, but not for some weeks.

On the 31st of August the plaintiffs wrote to McDonald & Butler, as follows:

PL'FFS' EX. 70.

"AUGUST 31ST, 1881.

"GENTLEMEN: The motion in the case of Tremearne, Leigh, *et al.* *v.* Forsyth *et al.* came on before Judge Drummond this morning, and he entered an order directing the clerk to file the record and docket the cause on the chancery side of the court. The judge will forward the papers to the clerk at Indianapolis to-day.

"I went to Crown Point, as indicated in my last letter, got the clerk to make a proper certificate, and served T. S. Fancher with notice of motion.

"Fancher was very much worked up on receiving the papers. He took me to his office, saying he had never been in contempt, and did not want to be, especially to Judge Drummond. He then showed me the detached exhibits, and I made exact copies of them. He then concluded to restore the exhibits to the files of the Lake county circuit court, and he went with me to the clerk and returned the exhibits.

"The clerk made a supplemental record, comprising copies of the exhibits, and handed it to Fancher, and he sent it to DePfuhl, who presented the supplemental record to Judge Drummond in expiation of the original transgression.

"Mr. DePfuhl wants the demurrer argued before Judge
248 Drummond, and we are willing that it should be so.

"I will prepare the demurrers, and will send them to you. I would prefer that you should sign the certificate of counsel.

"Judge Drummond cannot hear the motion until some time next month.

"The point I had in mind in pressing the motion of Fancher and DePfuhl has been satisfactorily carried. After obtaining a sight of the original exhibits, and making a copy of them, I had no trouble in convincing the attorneys of the party examining the Forsyth title that the Tremearne suit was bogus, and started merely for blood money.

"The title has been approved.

"It may have appeared to you that some of my later communications have been extremely urgent, but I assure you they were intended only in the best spirit. We are much obliged for your promptness and valuable suggestions.

"Yours, very truly,

"J. R. DOOLITTLE, JR.,
"*For Doolittle & McKey.*

"Messrs. McDonald & Butler."

249 On the 3d of September the plaintiffs prepared a demurrer to said bill and enclosed the same to McDonald & Butler, and wrote in regard to the same as follows:

"GENTLEMEN: I enclose you herewith demurrer of Jacob and Caroline M. Forsyth to bill of complaint of Charles Edward Tremearne *et al.*, recently removed to U. S. cir. ct. for Indiana.

"I concluded to sign the certificate of counsel because I was familiar with the points on the bill. I am not admitted to the court in your State, but understand that an admission to the Supreme Court of the U. S. is an admission to the circuit court and district courts. If you have any doubt about this, please sign another certificate.

"One good and sufficient ground of the demurrer is that John Petherick signed his own name alone to the contract with Tremearne, failing to sign the names of either Jacob Forsyth or his wife.

"You will find the contract among the exhibits in the record. Please examine the files, and if the record has reached the clerk and the cause has been docketed, as undoubtedly has already been done, please file the demurrer and notify us of the date of filing. As soon as Judge Drummond is at liberty to do so we will bring on the argument of demurrer before him. * * *

"Yours, very truly, J. R. DOOLITTLE, JR.,
"For DOOLITTLE & McKEY.

"Messrs. McDonald & Butler, Indianapolis, Ind."

250 On the 12th of September one of said plaintiffs met the solicitor of the complainants in said suit, Francis DePfuhl, and stated that he desired to bring on the argument of said demurrer at an early day, and asked said DePfuhl what time would suit him for that purpose. Said DePfuhl stated that he was very busily engaged and would wish to have the argument deferred for awhile.

On the 3d of October one of said plaintiffs had a conference with said DePfuhl in regard to the argument of said demurrer, and was informed by him that he would be ready to take it up and argue it either that week or the next. Said plaintiff stated to him that he would confer with Judge Drummond, and, if possible, fix the time for the argument.

On the 7th of October said plaintiff called upon Judge Drummond and asked him when he could hear the argument. The judge stated that he was much engaged in other matters at that time and that it would probably be a long time before he could hear the argument, and suggested that it had better be presented to Judge Gresham at Indianapolis.

One of said plaintiffs addressed the following note to Francis DePfuhl:

PL'FFS' EX. 72.

"OCT. 7TH, 1881.

"DEAR SIR: I called on Judge Drummond to-day and inquired as to when he could hear the argument of the demurrer in the case of Tremearne *et al. v.* Forsyth *et al.* The judge answered me that he was so busy with other matters at present that he could not take it up, and suggested that the demurrer be argued before Judge Cresham.

"I wish the matter disposed of, and since Judge Drummond cannat hear it, I shall be obliged, although at considerable inconvenience to myself, to bring the matter on before Judge Gresham.

Can you indicate to me any time within a few weeks which
251 would suit you? I could attend to the matter the latter part of next week at Indianapolis.

"Please let me hear from you, and oblige yours, very respectfully,

"J. R. DOOLITTLE, JR.

"Francis DePfuhl, Esq., attorney-at-law."

On the 7th of October the plaintiffs addressed the following to McDonald & Butler:

PL'FFS' EX. 73.

"OCT. 7TH, 1881.

"GENTLEMEN: In the case of Tremearne *et al. vs.* Forsyth *et al.* Judge Drummond has to-day intimated that he cannot hear the argument of our demurrer for a long time at least.

"As we desire to bring on the argument at an early day will you have the kindness to let us know at what time Judge Gresham can hear it. I do not apprehend that it will consume much time, and perhaps the other side would not participate in the argument.

"The notice can be prepared and served from here.

"Yours, very truly, DOOLITTLE & McKEY.

"Messrs. McDonald & Butler, Indianapolis, Ind."

On the 10th of October the plaintiffs received from McDonald & Butler a letter containing, among other things, as follows:

252 PL'FFS' EX. 74.

"INDIANAPOLIS, IND., *Oct.* 8, 1881.

"Messrs. Doolittle & McKey, 184 Dearborn St., Chicago, Ills.:

"GENTLEMEN: Your two favors of the 7th inst. rec'd. The judge (Gresham) says he will hear the demurrer a week from next Wednesday, which will be the 19th.

"As there are no sol'rs names entered here for complainants we will rely on you to notify the complainants, and bring such proof of the notice as will justify the court in hearing the dem. in their absence, should they fail to attend.

"Yours, truly, McDONALD & BUTLER."

On the 11th of October one of the plaintiffs addressed the following letter to Francis DePfuhl:

PL'FFS' EX. 75.

"OCT. 11TH, 1881.

"DEAR SIR: I hear from Messrs. McDonald & Butler, of Indianapolis, that Judge Gresham will hear the argument of the demurrer in the case of Tremearne *et al. v.* Forsyth *et al.* on Wednesday, Oct. 19.

"Will you let me know to-morrow whether that will be satisfactory to you, and oblige yours, respectfully, J. R. DOOLITTLE, JR.

"Francis DePfuhl, Esq., —— 13, No. 152 Dearborn St.

"Perhaps you would, and surely I could, agree on the points to be made on the demurrer, and you could present yours in writing.

"We could stipulate as to the points, and this might obvi-
253 ate the necessity for your going to Indianapolis."

The plaintiffs received the following letter in reply:

PL'FFS' EX. 76.

"CHICAGO, *Oct.* 12, 1881.

"J. R. Doolittle, Jr., Esq.

"MY DEAR SIR: To yours of the 11th I beg to say that it would suit me very well to submit points in writing, either to Judge Gresham or Drummond, and in fact I would greatly prefer doing so, to a trip to Indianapolis. It would be but fair that neither of — should in that case make oral argument, or in fact go to Indianapolis, but we both send our points and the stipulation which you in your favor have suggested.

"Your demurrer being a general one, I am consequently not informed wherein you lay your basis. I should, therefore, know before I prepare points what position you propose to take and wherein more particularly my bill is bad. Please embody this in your stipulation in some form and let me know your pleasure.

"Respectfully, yours,

"FRANCIS DEPFUHL."

On the 13th of October the plaintiffs had an interview with said DePfuhl and stated to him that they would not consent to a stipulation not to argue the demurrer orally on behalf of the defendants, but agreed to stipulate with him as to the points upon which they would argue the demurrer, and made an appointment with said DePfuhl at their office on the next day.

On the 14th of October the plaintiffs had an interview with said DePfuhl at their office, and the following stipulation was drawn up by them and signed:

254 PL'FFS' EX. 77.

Bill.

U. S. Circuit Court, District of Indiana. In Chancery.

CHARLES EDWARD TREMEARNE *et al.*
vs.
CAROLINE M. FORSYTH and JACOB FORSYTH.

Points to be argued on the hearing of the demurrer, filed in the above-entitled cause by the defendants in the bill of complaint:

I.

The agreement signed by Petherick is void as to the defendants.

A. It was not executed in the names of the defendants.

B. The power of attorney to Petherick gave no authority to execute the agreement in the form employed or upon the terms therein contained.

It was nugatory, a mere barren power without scope or functions, without the letter of instructions of Dec. 31, 1880.

C. The agreement signed by Petherick was not a contract of sale. The was no mutuality of obligation between the vendors and the vendee, the East Chicago Land and Dock Company. Petherick agreed to sell, but the vendee did not agree to buy. Tremearne covenanted that the vendee would buy. No action could be maintained against the vendee for a breach of the contract.

II.

For another reason the agreement of Petherick is void as against Caroline M. Forsyth.

255 A. He had no power to act as her attorney-in-fact. The letter signed by her under date of Dec. 31, 1880, does not give Petherick any power; at most it but recognizes Jabob Forsyth as her agent, but gives him no power to appoint another person her attorney-in-fact.

B. Jacob Forsyth did not attempt to authorize Petherick to sign a contract in the name of Caroline M. Forsyth. He neither signed her name to any paper nor empowered any one else to do so.

III.

The complainants have no standing in court, having no equitable interest under the Petherick agreement. The vendee named,

the East Chicago Land and Dock Company, is the sole party in interest.

IV.

The assignment in blank written upon the Petherick agreement is void and inoperative.

A. Tremearne had no interest to transfer.

B. Such an agreement is not assignable by endorsement in blank.

It is hereby stipulated that the demurrer herein shall be argued upon the points above stated and no others, and that the hearing of the demurrer may be brought on before Hon. Walter Q. Gresham, at Indianapolis, on Friday, Oct. 21, 1881, or as soon thereafter as counsel can be heard.

Dated Chicago, Oct. 14, 1881.

FRANCIS DEPFUHL,
Attorney and Solicitor of Charles Edward Tremearne, John Studdy Leigh, and Edward Payne.
DOOLITTLE & McKEY,
Solicitors of Defendants.

256 On the 14th of October the plaintiffs addressed the following letter to McDonald & Butler:

PL'FFS' EX. 78.

"OCT. 14TH, 1881.

"GENTLEMEN: I have succeeded in making some little progress in regard to the argument of the demurrer in the case of Tremearne *et al. v.* Forsyth *et al.* Mr. DePfuhl is the attorney of the complainants and has the entire control and management of the case on their behalf.

"In order to insure an appearance, I have consented to the making of a stipulation specifying and limiting the grounds upon which the demurrer will be argued, which I herewith enclose.

"Mr. DePfuhl says he cannot possibly be present at Indianapolis on Wednesday, the 19th, but has agreed in the stipulation to be present on Friday, Oct. 21st.

"I wish on the receipt of this you would confer again with Judge Gresham, and ascertain whether Friday instead of Wednesday would be acceptable to him. Mr. DePfuhl much prefers to argue the matter on Friday, but I am inclined to think if Judge Gresham cannot hear the matter Friday he would agree to argue it on Saturday. It may be that as an accommodation to foreign attorneys he would arrange the matter for Friday.

"I expect to go to Indianapolis at the same time, and will have the pleasure of a personal interview with you. I wish, however, that you would give the bill, demurrer, and points a careful examination, so that you can participate in the argument, and, if deemed best, conduct it.

"Please inform me by telegram of the action of Judge Gresham in setting the matter for argument.

"Yours, very respectfully, J. R. DOOLITTLE, JR.,
"*For Doolittle & McKey.*

"Messrs. McDonald & Butler, Indianapolis, Ind."

257 On the 17th of October the plaintiffs received the following reply:

PL'FFS' EX. 79.

"INDIANAPOLIS, IND., *Oct. 15th*, 1881.

"J. R. Doolittle, Jr., 184 Dearborn —, Chicago.

"D'R SIR: Your favor of 14th with enclosure received. Judge Gresham says that it will be impossible for him to hear the argument until one week from next Wednesday, October 26th.

"Yours truly, McDONALD & BUTLER."

After receiving said letter the plaintiffs wrote as follows to Francis DePfuhl:

PL'FFS' EX. 80.

"OCT. 17TH, 1881.

"DEAR SIR: Judge Gresham cannot hear the argument of the demurrer in the case of Tremearne *et al. v.* Forsyth *et al.* until Wednesday, Oct. 26, 1881.

"I have just received word from Messrs. McDonald & Butler. I shall be ready to leave here Tuesday night, Oct. 25th. Is this satisfactory to you?

"Yours very truly, J. R. DOOLITTLE, JR.

"Francis DePfuhl, Esq., 152 Dearborn St."

Said DePfuhl had requested the plaintiffs to furnish him with a list of the authorities which they had cited on the argument, and on the 20th of October the plaintiffs addressed the following communication to him:

258 PL'FFS' EX. 81.

TREMEARNE *et al. v.* FORSYTH *et al.*

OCT. 28TH, 1881.

SIR: On the argument of the demurrer in this case before Judge Gresham we shall cite the following authorities:

Story on Contracts, sec. 141.
Addison on Contracts, bk. 1, ch. 1, sec. 1, subd. Assent of the parties.
Addison on Contracts, bk. 1. ch. 1, sec. Q, subdivision as follows:
Rights of principals upon deeds made by agents.
Liabilities of principals on contracts under seal.
Right of action of agents on contracts under seal.
Execution of deeds by agents not rendering them personally liable.
Wilks *v.* Back, 2 East, 142.
Berkeley *v.* Handy, 5 Barn. & Crees., 355.
McArdle *v.* Irish Iodine M'f'g Co., 15 Ir. C. L. R., 146.
Townsend *v.* Corning, 23 Wend., 439.
Townsend *v.* Hubbard, 5 Hill, 351.

Deming *v.* Bullitt, 1 Blackf., 241.
Hunter's Adm'r *v.* Miller's Ex'r, 6 B. Monroe, 612.
Bissell *v.* Terry, 69 Ill., 184.

Respectfully yours, DOOLITTLE & McKEY.

To Francis DePfuhl, Esq., 152 Dearborn St., Chicago.

The plaintiffs addressed the following letter to McDonald & Butler:

259 "OCT. 20TH, 1881.

"GENTLEMEN: I have served notice upon Francis DePfuhl that we will bring on the argument of the demurrer in the case of Tremearne *et al. v.* Forsyth *et al.* on Wednesday, Oct. 26. Will you please state to Judge Gresham that the matter will be presented on that day, and much oblige; yours, very truly,

"J. R. DOOLITTLE, JR.

"Messrs. McDonald & Butler, Indianapolis, Ind.

"P. S.—I expect that Mr. Jacob Forsyth will be in Indianapolis on the 26th and have a conference with you."

On the 24th of October the plaintiffs addressed the following letter to Francis DePfuhl:

PL'FFS' EX. 83.

"OCT. 24TH, 1881.

"DEAR SIR; I shall start for Indianapolis to-morrow evening, so as to reach there Wednesday morning in time to present the argument on the demurrer.

"Can I see you to-morrow morning about 11 a. m. at my office?

"Yours, very truly, "J. R. DOOLITTLE, JR."

"Francis DePfuhl, Esq., 152 Dearborn St., room 13."

On the 25th of October the plaintiffs received the following letter:

PL'FFS' EX. 84.

"CHICAGO, *October* 25, 1881.

"J. R. Doolittle, Esq.

260 "MY DEAR SIR: I am in the midst of a trial now, and have one suit on to-days' call before Judge Anthony, and one in the county court, for condemnation of some land required by the corporation I represent for a street. Thus you see it will be only at great loss to myself and my clients, and at the greatest inconvenience, that I could at all go to Indianapolis. I will write these facts to Judge Gresham, and beg of him to keep the matter open until I can get down to Ind., say not to exceed a week; that is to say, if you insist upon going. Should you, however, grant me a few days, then I'll engage to go or "die." (*Sic*) What say you? Please answer by bearer, who will bring your reply to me at court. I trust you will oblige me; indeed, I regret the trouble I am giving you.

"Very truly yours, "FRANCIS DEPFUHL."

After receiving said communication one of said plaintiffs called upon Mr. DePfuhl and stated that the plaintiffs were determined to push the argument of the demurrer, and also stated that one of said plaintiffs expected to leave for Indianapolis that night.

Late in the afternoon of the same day the plaintiffs received the following telegram:

PL'FFS' EX. 85.

"INDIANAPOLIS, IND., —— 25, 1881.

"To Doolittle & McKey, 184 Dearborn St.

"Judge Gresham has been called away from the city and will be gone several days.

"McDONALD & BUTLER."

On or about the 26th of October said plaintiffs called on the Hon. Thomas Drummond, U. S. circuit judge, stating that Judge Gresham had left Indianapolis, and asked Judge Drummond to hear
261 the argument of the demurrer. Judge Drummond stated in reply that he would be unable to hear the argument himself, but that he would endeavor to have Judge Gresham hear it at Chicago.

On the 27th of October one of said plaintiffs had another interview with Judge Drummond on the subject.

On the 28th and 29th of October the plaintiffs endeavored to communicate with Judge Gresham, and on the 29th of October again requested Judge Drummond to hear the argument in said cause. Judge Drummond stated in reply that it was impossible for him at that time to fix a time when the cause could be argued before him.

On the 29th of October the plaintiffs had a conference with Hon. Joseph E. McDonald, of the firm of McDonald & Butler, and stated to him that they were especially anxious to have the demurrer disposed of before the 10th of November, at which time they stated that the Forsyth estate would probably be sold. Said McDonald stated that Judge Gresham would certainly be at Indianapolis on the first of November, and that upon his return to Indianapolis he would confer with said judge and would have an early day fixed for the argument of said demurrer, and suggested to the plaintiffs that a motion should be made fixing the time of such argument for the second of November.

The plaintiffs prepared a notice, and on the 29th of October wrote as follows to McDonald & Butler:

PL'FFS' EX. 86.

"OCT. 29TH, 1881.

"GENTLEMEN: At the suggestion of Hon. Joseph E. McDonald, of your firm, we have served notice of argument in the demurrer filed in Tremearne *v.* Forsyth for Wednesday, Nov. 2, herewith enclosed. An affidavit of service is annexed to the notice.

"If Judge Gresham will not be able to hear the matter on Wednesday, please notify us as early as possible by telegraph.

262 "Yours, very respectfully, DOOLITTLE & McKEY.

"Messrs. McDonald & Butler, Indianapolis, Ind."

On the 31st of October one of said plaintiffs called on said DePfuhl and stated to him that Judge Drummond had declined to fix a time for the argument of the demurrer; that Judge Gresham had returned to Indianapolis, and that the argument must be made there.

On the same day the plaintiffs received the following telegram:

PL'FFS' EX. 87.

"INDIANAPOLIS, IND., 31, 1881.

"To Doolittle & McKey, Howland B'd'g:"

"Forsyth case set for hearing on demurrer for Wednesday, November second.

"J. E. McDONALD."

The plaintiffs addressed the following note to Francis DePfuhl:

PL'FFS' EX. 88.

"OCT. 31ST, 1881.

"DEAR SIR: The case of Tremearne *v.* Forsyth has been set for argument on the demurrer for Wednesday, Nov. 2, by Judge Gresham, in the U. S. court at Indianapolis.

"I shall leave here Tuesday night, and be ready to argue the matter on Wednesday.

"Yours, very truly, J. R. DOOLITTLE, JR.

"Francis DePfuhl, Esq., 152 Dearborn St., Chicago."

263 On the evening of the first of November an attorney-at-law, S. E. Eastman, called at the office of the plaintiffs and stated that Messrs. Armstrong & Harris, of Indianapolis, had been retained as attorneys in the case on behalf of the complainants, and requested that the argument of the demurrer should be postponed. The plaintiffs stated to Mr. Eastman that the attorney of record, Mr. DePfuhl, had had many interviews with the plaintiffs in regard to the argument of the demurrer; that the points upon which it would be argued and the authorities which would be cited by the complainants to sustain the demurrer had been furnished to Mr. DePfuhl for several days, and that under the circumstances the plaintiffs did not feel called upon to grant any extension of time whatever.

One of said plaintiffs went to Indianapolis on the night of Nov. 1st, and on the morning of Nov. 2d called at the office of McDonald & Butler, in Indianapolis, and had a conference with Joseph E. McDonald in regard to the argument of the demurrer. It was understood and agreed between said plaintiff and Mr. McDonald that in case the court would hear the argument it should be conducted on behalf of the defendants, the Forsyths, by said plaintiff.

On presenting the matter to Judge Gresham he announced that the arguments would proceed.

William H. Calkins and Mr. A. C. Harris appeared for the complainants. Said plaintiff presented the argument in support of the demurrer orally, consuming about an hour and a half in the statement of the case and in the argument of the points mentioned in said stipulation. He was followed on the same side by Mr. McDonald, who argued to the court briefly the proposition that under the laws of Indiana the executory contract of a married woman to convey land could not be enforced specifically even though the contract were in writing and signed by the husband and the wife.

The court having taken a recess until the afternoon said plaintiff stated to Mr. McDonald that the question of the power of a
264 married woman to make an executory contract to convey her real estate had not been included in the points covered by the stipulation between the plaintiffs and Mr. DePfuhl; that the plaintiffs had given that question a partial examination and reached the conclusion that the question was at best a very doubtful one, with the chances in favor of the right of a married woman to enter into an executory contract. Furthermore, that as the plaintiffs understood the facts of the case the question could not fairly rise.

In the afternoon William H. Calkins answered the argument which had been made on behalf of the defendants, consuming about an hour and a half's time, and said plaintiff replied briefly.

Said Calkins applied to the court for time to furnish authorities, and the court announced that he could have until Saturday to furnish his authorities, and that said plaintiff could reply by the Tuesday following. Said plaintiff returned to Chicago on the morning of the 3d of November.

On Saturday, the 5th of November, the plaintiffs received the following letter:

PL'FF'S EX. 89.

"INDIANAPOLIS, *Nov.* 4, 1881.

"J. R. Doolittle, Jr., Esq.

"DEAR SIR: This morning Mr. Calkins appeared in company with Mr. DeF. and asked leave to file an amended bill or an amendment to his bill. Mr. McDonald was out of the city and I told the counsel that they could prepare their brief and amendment, sending copies of both to you, and I would hear any objection which you or Mr. McDonald might desire to make to the filing of the amendment on Saturday. Unless you know some good reason why the amendment should not be allowed you had better prepare your brief
265 as if it were in, as that will save delay.

"Yours truly,

"W. Q. GRESHAM."

Waiting till 4 p. m. without receiving the amendment of the bill of the brief of Calkins & Harris, the plaintiffs caused a telegram to be sent to Judge Gresham informing him that neither the brief nor the amendment had been served upon the plaintiffs.

On the 7th of November the plaintiffs received a letter-press copy of the amendment to the bill and a letter-press copy of the brief of Calkins and Harris in opposition to the demurrer, which are as follows:

PL'FFS' EX. 90.

UNITED STATES OF AMERICA, } ss:
State of Indiana, }

In the United States Circuit Court for the District of Indiana. In Chancery.

CHARLES EDWARD TREMEARNE, JOHN STUDDY LEIGH, and EDWARD PAYNE
vs.
CAROLINE M. FORSYTH and JACOB FORSYTH. } No. 7292.

To the Honorable Thomas Drummond, judge of the circuit court, and the Honorable Walter Q. Gresham, judge of the district court for the district of Indiana:

Charles Edward Tremearne and John Studdy Leigh, of London, in England, and Edward Payne, of the city of Chicago, in the State of Illinois, and citizens of the aforesaid-mentioned States and countries, by leave of court bring this their amended bill against
266 Caroline M. Forsyth and Jacob Forsyth, her husband, citizens of the county of Lake, in the State of Indiana; and

Thereupon your orators complain and say that the said Caroline M. — and the said Jacob —, defendants to this bill, are husband and wife; that heretofore, to wit, on and before the 31st day of December, A. D. 1880, they were the owners and in possession of about eight thousand (8,000) acres of land, situate in the northwesterly portion of the county of Lake, in the State of Indiana, and, as your orators are informed and believe, the larger portion of said property and the legal title thereto was vested in said Caroline M. —, but what particular portions of said estate were vested in the said Caroline M. —, and what particular portions, if any, were vested in the said Jacob —, is unknown to your orators.

That on said 31st day of December, A. D. 1880, aforesaid, the said defendants to this bill being desirous of selling and disposing of the said tract and tracts of land aforesaid (hereinafter more particularly described), and in pursuance of negotiations theretofore had and pending between the parties hereinafter more particularly set forth and described, entered into certain contracts and stipulations in writing, and granted to one John Petherick, of London, England, certain powers as in the said warrant of attorney hereinafter set forth will more fully and particularly appear, by which warrant of attorney the said Petherick was appointed the attorney-in-fact of the said defendants, for them and in their names, to enter into certain preliminary articles of contract for the bargain and sale of said real estate, as in said warrant of attorney clearly appears. And your orators show that the said Caroline M. —, at the time of the execution of the

said warrant of attorney by the said Jacob —, signed a certain paper or instrument in writing addressed to one of your orators, viz.,
267 John Studdy Leigh, by which letter or instrument in writing she acknowledged the appointment of the said Jacob — as her agent in the management, disposition, and sale of the said property aforesaid, and which said letter or instrument in writing was made, executed, and delivered to the said Petherick simultaneously with the warrant of attorney so signed by the said Jacob — as aforesaid.

And your orators show that it was the intention of the parties to the said instrument in writing that the same should constitute one act, and both of said instruments of writing were intended, and, in fact, describe the same transactions and negotiations which are hereinafter more fully set forth.

And your orators show that the said instrument in writing, signed by the said Caroline M. —, has reference to, and is descriptive of, the negotiations and transactions there pending between the said Jacob — for himself, and as agent for the said Caroline M. — and the said John Petherick named in said warrant of attorney.

And your orators show that the said Caroline M. — had full knowledge of the contract which had been heretofore entered into between the said John Petherick and the said Jacob Forsyth, and the said letter or instrument in writing, signed by the said Caroline M. —, was designed to, and did, ratify, affirm, and constitute the said Petherick her attorney and agent for the disposition and sale of said lands as in said warrant of attorney more particularly set forth, and that the said letter or instrument in writing was, and is, in law an appointment and designation of the said John Petherick as the agent of the said Caroline M. — as well as the agent of the said Jacob —; and your orators now annex copies of the said warrant of attorney to this bill and mark the same "Exhibit A," and of the said letter or instrument in writing of the said Caroline M. — and mark the same "Exhibit B," and pray that the same may be taken and considered as a part of this bill.

268 And your orators show that long prior to the date of the execution of the said warrant of attorney, to wit, the 31st day of December, A. D. 1880, there had been negotiations pending between the said Petherick and the said plaintiffs—one or more of them—with the full knowledge of the said defendants, by which the said Petherick undertook to sell the said estate of the said defendants, as their agent, to the said plantiffs; that during said negotiations various ways were suggested by which the said land might be bargained, sold, and conveyed; that during five or six months immediately preceding said date last aforesaid various conversations and negotiations, including a large correspondence, took place between the said Petherick, for and on behalf of the said defendants, the Forsyths, and various parties relating to the sale of said land; of all of which correspondence, conversation, and negotiation the said Jacob — and the said Caroline M. — had full knowledge. And it was finally agreed that the said Petherick, who is a citizen of London, England, should be authorized to enter into a preliminary contract of bargain and sale with such person or persons as might

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To the Honorable Thomas Drummond, judge of the circuit court, and the Honorable Walter Q. Gresham, judge of the district court for the district of Indiana:

Charles Edward Tremearne and John Studdy Leigh, of London, in England, and Edward Payne, of the city of Chicago, in the State of Illinois, and citizens of the aforesaid-mentioned States and countries, by leave of court bring this their amended bill against
266 Caroline M. Forsyth and Jacob Forsyth, her husband, citizens of the county of Lake, in the State of Indiana; and

Thereupon your orators complain and say that the said Caroline M. — and the said Jacob —, defendants to this bill, are husband and wife; that heretofore, to wit, on and before the 31st day of December, A. D. 1880, they were the owners and in possession of about eight thousand (8,000) acres of land, situate in the northwesterly portion of the county of Lake, in the State of Indiana, and, as your orators are informed and believe, the larger portion of said property and the legal title thereto was vested in said Caroline M. —, but what particular portions of said estate were vested in the said Caroline M. —, and what particular portions, if any, were vested in the said Jacob —, is unknown to your orators.

That on said 31st day of December, A. D. 1880, aforesaid, the said defendants to this bill being desirous of selling and disposing of the said tract and tracts of land aforesaid (hereinafter more particularly described), and in pursuance of negotiations theretofore had and pending between the parties hereinafter more particularly set forth and described, entered into certain contracts and stipulations in writing, and granted to one John Petherick, of London, England, certain powers as in the said warrant of attorney hereinafter set forth will more fully and particularly appear, by which warrant of attorney the said Petherick was appointed the attorney-in-fact of the said defendants, for them and in their names, to enter into certain preliminary articles of contract for the bargain and sale of said real estate, as in said warrant of attorney clearly appears. And your orators show that the said Caroline M. —, at the time of the execution of the

said warrant of attorney by the said Jacob —, signed a certain paper or instrument in writing addressed to one of your orators, viz.,
267 John Studdy Leigh, by which letter or instrument in writing she acknowledged the appointment of the said Jacob — as her agent in the management, disposition, and sale of the said property aforesaid, and which said letter or instrument in writing was made, executed, and delivered to the said Petherick simultaneously with the warrant of attorney so signed by the said Jacob — as aforesaid.

And your orators show that it was the intention of the parties to the said instrument in writing that the same should constitute one act, and both of said instruments of writing were intended, and, in fact, describe the same transactions and negotiations which are hereinafter more fully set forth.

And your orators show that the said instrument in writing, signed by the said Caroline M. —, has reference to, and is descriptive of, the negotiations and transactions there pending between the said Jacob — for himself, and as agent for the said Caroline M. — and the said John Petherick named in said warrant of attorney.

And your orators show that the said Caroline M. — had full knowledge of the contract which had been heretofore entered into between the said John Petherick and the said Jacob Forsyth, and the said letter or instrument in writing, signed by the said Caroline M. —, was designed to, and did, ratify, affirm, and constitute the said Petherick her attorney and agent for the disposition and sale of said lands as in said warrant of attorney more particularly set forth, and that the said letter or instrument in writing was, and is, in law an appointment and designation of the said John Petherick as the agent of the said Caroline M. — as well as the agent of the said Jacob —; and your orators now annex copies of the said warrant of attorney to this bill and mark the same "Exhibit A," and of the said letter or instrument in writing of the said Caroline M. — and mark the same "Exhibit B," and pray that the same may be taken and considered as a part of this bill.

268 And your orators show that long prior to the date of the execution of the said warrant of attorney, to wit, the 31st day of December, A. D. 1880, there had been negotiations pending between the said Petherick and the said plaintiffs—one or more of them—with the full knowledge of the said defendants, by which the said Petherick undertook to sell the said estate of the said defendants, as their agent, to the said plantiffs; that during said negotiations various ways were suggested by which the said land might be bargained, sold, and conveyed; that during five or six months immediately preceding said date last aforesaid various conversations and negotiations, including a large correspondence, took place between the said Petherick, for and on behalf of the said defendants, the Forsyths, and various parties relating to the sale of said land; of all of which correspondence, conversation, and negotiation the said Jacob — and the said Caroline M. — had full knowledge. And it was finally agreed that the said Petherick, who is a citizen of London, England, should be authorized to enter into a preliminary contract of bargain and sale with such person or persons as might

be desirous of purchasing said estate, and for that puspose the warrant of attorney and the letter or instrument in writing, signed by the said Caroline M. —, and which is, in fact, a part and parcel of the contract contained in the warrant of attorney aforesaid, was made, executed, and delivered, and the said Petherick undertook to perform the covenants contained therein.

And your orators show that at the time of the making the said warrant of attorney it was stipulated therein that the said Petherick, in making said sale, should sell said land at the rate of one hundred and forty ($140.00) dollars per acre, United States currency, and upon such other conditions as will appear in a letter of instructions of even date herewith addressed by me to the said Petherick;

but your orators show that said clause had reference to the
269 letter of instructions of date October 28, A. D. 1880, addressed to one of your orators, viz., Edward Payne, Esq., instead of the said Petherick, as in said warrant mentioned, and which contained full instructions as to the terms of sale and the conditions of payment, and which is in fact the letter of instructions mentioned in the said warrant of attorney, although inadvertently and improperly described therein, a copy of which letter of instructions is exhibited with this bill, and with leave of your honors is marked "Exhibit C" and made a part hereof and hereby referred to.

And your orators further show that upon the receipt of the said letter and the said warrant of attorney the said Petherick, to wit, on the 22d day of January, A. D. 1881, entered into a preliminary contract in writing with the plaintiffs, by the terms of which he bargained and sold the said estate, situate in Lake county, Indiana, aforesaid, in all things conformedly to the letter of instructions and the powers granted to him in the warrant of attorney, and his appointment by the letter or instrument in writing signed by said Caroline M. ——.

And your orators show that although the said preliminary contract is signed on behalf of said Jacob Forsyth and Caroline M. Forsyth by and in the name of the said John Petherick without further designation of authority, or other description, yet it was in truth and in fact the exercise of his authority under the warrant of attorney of the said Jacob — and the letter, or instrument in writing of the said Caroline M. —, and was made for them and on their behalf, and was intended to bind them so far as the authority given to him could or might bind his principals.

And your orators show that by the terms of said preliminary contract (which your orators beg to exhibit with this bill, attaching a copy thereto, marked "Exhibit D," for greater certainty) the said

estate was sold to the said plaintiffs under the following
270 designation and description, viz: "Charles Edward Tremearne, of Walbrook House, in the city of London, financial agent on behalf of a company which has been duly organized and called the East Chicago Land and Docks Company, hereinafter called the company of the other part," by which description and designation it was intended to contract with and make the plaintiffs the true parties in interest to said contract.

And your orators show that it was intended at the time of the making and delivery of said preliminary contract to organize and properly incorporate a company to be called the East Chicago Land and Docks Company, capable in law of holding and conveying real estate. And it was further agreed and understood that the said Charles Edward Tremearne and the other two parties named as complainants to this bill, viz: John Studdy Leigh and Edward Payne, should and would associate themselves together for the purpose of incorporating the said company aforesaid; and so far as an agreement to incorporate was concerned they had formed a company as between themselves known by that name, but the said company at the time of the making and execution of said contract was not a legal entity and could not hold and own real estate, and were incapable of suing or being sued.

And your orators show that the designation in the said preliminary contract of Charles Edward Tremearne, of Walbrook House, in the city of London, as financial agent on behalf of a company, was intended to be and in fact was the designation of a person as trustee to make said contract preliminary to the formation of said company and to perfect its organization, act for it, and otherwise do and perform all that was necessary to do and perform about the premises until such time as the said company could organize and be recognized by the laws of this State or the United States, and was fully empowered under such designation to act for and
271 on behalf of himself and his said cocomplainants to this bill. As to all of which the said defendants had full knowledge and notice.

And your orators further show that they are not informed as to whether a preliminary examination in the city of London, under the designation of the East Chicago Land and Docks Company, is effectual in law, and authorized to purchase and hold real estate in the United States of Amerioa, but your orators show that they have been and were advised a company may legally form an organization under the laws of this State, which will be full authority to purchase and hold real estate, to sell and convey the same, and hold and make good and perfect titles thereto. And your orators believe such a company would long since have been organized had it not been for the acts of the said defendants in violation of the said contract, as hereinafter more fully set out.

And your orators show that they are in truth and in fact the true and only parties in interest to the benefits arising under said contract under the designation and description aforesaid, and are the only persons in law or in equity who may maintain a suit to enforce the performance of the covenants contained in said contract.

Your orators further show that in and by said agreement the stipulated price or consideration for said real estate to be paid by your orators to said defendants was one hundred and forty dollars ($140.00) per acre for each acre of land, and including about two hundred acres which form a sheet of water known by the name of Lake Berry, such payment to be made as follows: Two hundred and fifty thousand dollars ($250,000) in cash on or before the

1st day of July, A. D. 1881; five hundred thousand dollars ($500,000) in the full paid up shares of stock at par to be issued by the said company, when organized, in manner and form as aforesaid, and the balance of said purchase price in shares of stock to be issued as aforesaid by the said company whenever the exact
272 acreage of the said estate should be ascertained by measurement.

And your orators further show that by the terms of said preliminary agreement the said plaintiffs were to appoint a competent engineer to make an inspection, survey, and measurement of the said land, so the exact acreage thereof might be definitely known and ascertained.

And your orators further show that by the terms of the said preliminary contract it was expressly stipulated that the titles to said land should be examined by your orators or counsel-at-law, to be designated by them, so they might be informed before the payment of any part of the purchase-money that the titles were perfect, absolute, and free from all incumbrances in the said defendants.

And your orators further show that the said land is referred to and described in the said agreement as "that certain tract of land called the Sheffield or Forsyth estate, consisting of eight thousand acres of land, be the same more or less, and situate and being in Lake county, in the said State of Indiana." And your orators show that it was intended by said general designation and description to describe certain tracts and parcels of land owned by the said defendants, and which is more fully described as follows, viz:

And your orators further show that by the terms of said preliminary agreement the time for the carrying into effect thereof expired on the 1st day of July, A. D. 1881, and your orators show that long prior to that time they were ready and willing to fully carry out and fulfil their part of said agreement and pay to the said defendants the full sum of two hundred and fifty thousand dollars ($250,000), but were prevented from so doing by the said
273 defendants. That the said defendants refused to allow or permit to said plaintiffs to obtain a survey and measurement of said land by an engineer to be designated by them, and failed and refused to clear off, discharge, and pay an incumbrance upon said estate amounting to the sum of nearly two hundred thousand dollars ($200,000).

And your orators expressly aver that the said estate is incumbered by mortgage executed by said defendants on said estate for a large sum, upon which apparently nothing has been paid, but how much is due thereon or how much has been paid, or what defences the defendants may have thereto, is unknown to your orators. But your orators are informed and believe, and therefore state the truth to be, that in a suit now pending in this court for the foreclosure of that mortgage against said defendants, they, the said defendants, have set up certain defences thereto and claim that a part of said sum named in the said mortgage is not due or owing, and your orators say it would be unsafe and insecure for them to pay to the said defendants the said sum of two hundred and fifty thousand

dollars ($250,000), being the first installment due on said preliminary contract, whilst said mortgage remains an apparent lien upon said estate, but they say they are ready and willing to pay into this court such sum as may be necessary to discharge said lien and save them harmless on account thereof, provided the same shall be deducted from the first installment due under said preliminary contract, as provded therein.

And your orators further show that the said defendants have refused to accept or receive from your orators any sum or sums of money which may be in excess of the amount due on said mortgage, and have in various ways and by various means refused to recognize the said preliminary contract or carry out its terms, and have thereby prevented your orators from performing that part of their said contract which by its terms was to be performed before
274 the said 1st day of July, A. D. 1881.

And your orators further show that the said defendants, as your orators are informed and believe, have bargained and sold said real estate to the Belt Line Railroad Company of Chicago, Ill's, a corporation organized and existing under and by virtue of the laws of the State of Illinois, and that said pretended sale was made prior to the 1st day of July, A. D. 1881, and therefore your orators state and show that it would have been ineffectual for them to have further pressed upon the defendants the performance of their said contract when they had put it out of their power to comply therewith by entering into said other pretended contracts with the said Belt Railroad Company aforesaid.

And your orators further show that their said contract was in full force, and in equity and good conscience ought to have been specifically and fully performed by the said defendants at the time when they so entered into said pretended contract with said Belt Railroad Company, and that your orators had every reason to believe and fully expected the said contract would be carried out in good faith, fully executed and performed by the defendants, and were surprised to learn and receive information that the defendants, disregarding their obligation in said contracts, had pretended to sell the said real estate to the said Belt railroad corporation. And your orators are unable to say why, or give any reasons for, the refusal of the defendants to carry out their said contracts, unless it be that the said real estate rapidly rose in value after the execution of the contracts first hereinbefore set out were made and the time for the performance of the covenants therein expressed. And as your orators are informed and believe the said defendants, by said pretended contract with said Belt railroad corporation, were to receive an advance per acre for
said land beyond the price of one hundred and forty dollars
275 ($140.00) per acre, or in some manner unknown to your orators derive some other benefit from said pretended sale to the said Belt railroad corporation in excess of the consideration they would receive from your orators.

And your orators further show that long before the bringing of this suit they fully demanded of the said defendants that they perform each and every of the stipulations and obligations resting upon

them, by them to be kept and performed under said contract, and demanded that they be allowed to survey and measure said land, and that the said defendants should clear the said titles for their said land from the mortgage incumbrance thereon; that they should receive the said two hundred and fifty thousand dollars ($250,000), the first installment provided in said contract to be paid to them, and should make, execute, and deliver a good and sufficient contract in writing, to be signed by them, for the conveyance of the land to the said East Chicago Land and Docks Company, or whomsoever they should appoint to receive said titles, and otherwise to do and perform each and everything which by the terms of said contract they were bound to do and perform, and which the defendants peremptorily refused to do or perform. All of which acts and things done by the said defendants in violation of said contracts is contrary to equity and in violation of law.

And your orators now here offer to perform all and everything which, by the terms of the said contracts aforesaid, they are in good conscience or in equity bound to do and perform. And to the end that the said contracts may be made effectual they offer—

First. To deposit in this court such sum or sums of money as may render them secure and safe against the incumbrance upon said land, to be deducted from the first installment due on said preliminaty contract aforesaid, and submit to your honors what amount or amounts is necessary for them to so deposit for the purpose aforesaid.

276 They further offer to enter into such obligations in such sums as your honors may deem best for the performance of the residue of said principal obligation whenever the former contract provided in said preliminary contract shall be made and signed. And generally they now here offer to do and perform all that is necessary to be done and performed by them to carry out the said contract, and make it effectual according to its true intents and purposes; and,

In consideration whereof, and for as much as your orators are relievable only in a court of equity where matters of this sort are properly and according to the statute of the United States in such cases made and provided, consci-able and relievable.

To the end therefore that the said defendants and every of them may, without oath, answer to all and singular the matters aforesaid, and will your honors grant to your said orators an order and decree directing the defendants to make, execute, and deliver the former contract, agreeing to convey the said land in the said bill mentioned aforesaid to them, or to the company to be organized by them, upon the payment of the money aforesaid, and the delivery of the shares of stock aforesaid, and in manner aforesaid, which your orators offer to deliver upon the making, selling, and delivering of said contract?

And will your honors further decree and order that they be allowed, through a good and competent engineer, to measure, survey, and inspect said land and ascertain its exact acreage?

And will your honors further decree that upon the full payment

of the purchase price in manner and form as aforesaid by them to the defendants, a good and sufficient deed, with full covenants of warranty, be made, executed, and delivered by the said defendants to your orators?

And will your honors further order and decree that upon
277 the final determination of the suit now pending in this court upon said mortgage incumbrances against the defendants, that the same shall be satisfied out of the monies so deposited as aforesaid by your orators, the same may be decreed to belong to your orators, or to be paid in further reduction of the said sum of $250,000.00 aforesaid to the said defendants?

And generally to do and perform all and everything which by the terms of the said contract they are bound to do and perform, and which in equity and good conscience they ought to do and perform. And that upon the final hearing and determination of the said cause the said defendants, and all persons acting or claiming title to said land by, through, or under them, be restrained and enjoined from setting up or ascertaining any title or interest in or to the premises aforesaid.

And that your orators may have such other or further relief in the premises as in equity and good conscience they are entitled.

And your orators will ever pray, &c., &c.

278 IN PL'FFS EX. 54 AND PL'FFS' EX. 90.

SHEFFIELD, LAKE CO., IND.,
Oct. 28, 1880.

Edward Payne, Esq., Chicago.

MY DEAR SIR: From your explanation of Mr. Petherick's last letter (14th June) I consider it necessary to state the business as I understand it.

The proposed capital to be $1,500,000 and to be distributed as follows:

$1,000,000 for the land, $400,000 for working capital, and $100,000 for promotion money in London (none required here). Of the $1,000,000 for the land Mr. Petherick gets $75,000 and I get in cash $425,000; Mr. Fisher in stock, $50,000; Mr. Powers in stock, $50,000; and I get in stock $400,000; making up the price of the land, $1,000,000; and, as already stated, the other $500,000 is to be devoted to the working capital for improvement, $400,000, and $100,000 to the promoters; in other words, I sign for $1,100,000.

Now, the above is what I am endeavoring to do. Also the following three particulars in addition, viz: To extend the time to Mr. Petherick three months from the 30th of Sept. last, or to the 31st of Dec. next, and to say also that, having so large an interest in the property, it would be necessary I should be in the directory and active management; and, lastly, that in case of absolute necessity I would take one-half of the stock, or $750,000.

I have parties here who stand ready to take stock from me as soon as the company is formed, but they do not desire to have

279 their names in it at this stage of the business. It may be necessary to have State legislation and also Congressional, and it is among such men—that is, public men—I propose to place a portion of the stock I take, or, as a famous representative skilled in that sort of thing said, where it will do the most good. I am glad to hear that Mr. Petherick's health is restored, and I hope that he will now push this undertaking through to a successful termination as soon as he anticipates.

Yours very truly, JACOB FORSYTH.

P. S.—In the last case, viz., that I am compelled to take one-half of the stock, or $750,000, the case would stand thus:

Mr. Petherick, $75,000 cash; to me, $175,000; to me stock, $650,000; Fisher & Powers, $100,000; promoters, $100,000; working capital, $400,000.

280 IN PL'FFS' EX. 90.

Brief on Demurrer for Complainants.

UNITED STATES OF AMERICA:

In the Circuit Court, District of Indiana.

CHARLES EDWARD TREMEARNE *et al. vs.* CAROLINE M. FORSYTH *et al.*

Formerly in this State the sealing of an instrument was necessary to its validity if it belonged to the class of writings upon which seals were required. But this has been abrogated by the statutes of Indiana, and now an unsealed instrument has the same force and effect as if it were sealed, or, more properly speaking, it has the same force and effect as sealed instruments under the former rule: 1st, G. & H., 263, and acts of 1858, page 39; also 2d, G. & H., 180, sec. 273; see also Wildcat Branch *vs.* Ball, 45th Indiana, page 213–15.

The last section referred to makes all writings valid that have been subscribed and delivered. It is so expressly held in the case of the Wildcat Branch *vs.* Ball, last cited. The court, Downey, J., says: The sealing dispensed with, the subscribing and delivery form the essential acts. This dispenses with the point made by Mr. Doolittle and the English case cited by him, as the solemnity of the execution of such instruments has been entirely wiped out by our statute. The next question is as to whether the signature of Petherick is the superscription of Forsythe and his wife, or, as was contended by Mr. Doodlittle, the signature of Petherick in his individual
281 capacity. We stated upon the argument that it was the law of this State that the manner of signature and the method of its being affixed to an instrument was not conclusive, nor did not control its legal effect, but that in construing instruments courts would look to the whole instrument and every part of it, and in the case cited from 1st Blackford by Mr. Doolittle we find that our position is maintained in every particular. The court in that case, viz., Demming *vs.* Bullitt, 241, say: "But in determining who are the parties to a deed, and in ascertaining the end and effect of it, we

must have recourse to the whole of the instrument." If in the body of the instrument it purports to obligate certain particular persons specified, and the authority of the signatory parties is shown to exist, to bind the parties named as principals the manner of signing becomes unimportant, and the substance alone is looked to to determine its legal effect. This is fully enunciated in the case referred to by Mr. Doolittle and cited upon.

In the preliminary contract, which is exhibited, signed by Petherick for the Forsythes and Tremearne for the company, then in process of organization, in the body of the instrument it is expressly stated that he, Petherick, is acting for and on behalf of Caroline M. Forsythe and Jacob Forsythe. The body of the instrument and its tenor and effect is that Caroline M. Forsythe and Jacob Forsythe are the parties of the one part, and that Petherick is acting for them and in their place and stead, and the instrument clearly states that they thereafter, whenever referred to, shall be designated as the vendors of the one part. It further appears in the body of the instrument that Petherick is acting under letters of attorney, dated the 31st day of December, 1880, signed by Jacob Forsythe, and under a letter of same date, signed by Caroline M. Forsythe, in which instrument also it is expressly stated by Petherick that he is authorized "to sign a preliminary contract on their behalf
for the sale of said estate." Hence it cannot be said that
282 Petherick was acting for himself, or that he intended to
act for himself, simply; on the contrary, as plain as words can make it, it is written in the contract that he was acting for and on behalf of the Forsythes. Turning to the power of attorney, it is found that Jacob Forsythe especially grants to Petherick the right and power to sign a preliminary contract of sale of the lands known as the Sheffield or Forsythe estate, etc. As to Jacob Forsythe, therefore, there can be no question but that the contract exhibited in connection with the power of attorney is well executed, is binding, and can be enforced.

As to Caroline M. Forsythe, the wife, it is contended that the power of attorney did not purport to appoint Petherick her attorney-in-fact. This is not necessary. It is sufficient if she appointed her husband, who could be her agent, and that she knew of the negotiations pending and sanctioned his acts in the premises.

The appointment of an agent to sell real estate may be made by parole. If the agent execute a contract in writing for the sale of real estate it will bind the principal, though the appointment of the agent was made by parole. Story on Agency, 8th edition. sec. 50: "And even where a statute, such as the statute of frauds, requires an instrument to be in writing in order to bind the party, he may, without writing, authorize an agent to sign it in his behalf, unless the statute positively requires that the authority also should be in writing." (Ibid. and note; see Wharton, Commentary on Agency and Agents, sec. 50, and authorities cited, 51.) In equity courts will discard the technical rules of agency and look alone to the substance of the contract made, and if such equities appear, though the contracts are informal, relief will be granted.

Let us apply these well-known principles of law to the case at bar. It appears that Jacob Forsythe is the agent of his wife
283 in all matters relative to the sale, negotiation, and management of the Forsythe estate, consisting of about 8,000 acres of land in Lake county, Indiana. This she expressly states in her letter, which is exhibited with the bill, in the strongest language known. "In this property," she says, "my husband invariably represents my interest as well as his own; that in all negotiations looking to its sale or management in any way" he acts for her and has full authority in the premises. Here, then, is the appointment, and here the notification and ratification of his appointment as her agent in writing. Now, as a general rule, we admit that an agent cannot delegate his authority, but if the principal authorized the agent to appoint other agents, and ratifies and affirms such appointment, or has knowledge of it and assents to it, or acquiesces in it, it is as valid as if made by the principal in person. Looking, then, at the letter signed by Mrs. Forsythe on date of the same day with the power of attorney, it appears that she had notice of the negotiations pending between Mr. Leigh, one of the plaintiffs, and Mr. Payne, another of the plaintiffs, and Mr. Petherick, who was appointed by the power of attorney to act for and in the place of her husband. She says, speaking of Mr. Colehour's interference, "that as it would appear to discredit my husband in his relations with you, Mr. Payne, and Mr. Petherick, I will repeat," etc. Here is a distinct admission of knowledge on her part, first, of the negotiations pending, and, second, that these negotiations were pending with the plaintiffs and Mr. Petherick. It was written on the same day that the power of attorney was executed, and, presumedly, were contemporaneous in their delivery. The amended bill expressly states that they were signed and delivered at the same time, and that the whole had reference especially to the power of attorney.

Here, then, is an express ratification, affirmance, and sanction by Mrs. Forsythe of the powers conferred upon Petherick in the
284 letters of attorney which are exhibited with the bill. It is unnecessary to argue a question of law so plain as this. These papers, being executed and delivered simultaneously, must be construed together as one act, and, looking at them in this light, every power and authority was conferred upon Petherick by both of the Forsythes to make, enter into, and deliver the preliminary contract which is exhibited with the bill.

We now come to the next question which was argued by Senator McDonald, which is that, under the laws of this State, a married woman is not bound by her executory contracts, as all married women are under disability and incapable of entering into contracts, except deeds of conveyance, in which her husband joins. Unquestionably this was the law until the passage of the act of 1879, found in the acts of assembly of that year, at page 160. In the construction of this statute by the courts the evils which were sought to be remedied must be considered. Ever since the State had been admitted the policy of legislation was to regard married women as under restraint and coercion by their husbands, so that they might

not exercise their free wills in contracting with any one, even with reference to their separate estates. This doctrine was applied by the courts in the most rigorous form. Many of the best lawyers of the State for many years doubted whether liens could be enforced against the separate estate of married women, even where such married women had been the cause of the expenditure of large sums of money in the betterment of their separate estates. The decisions of the courts were at variance and the law of mechanics' liens was much confused, and grave doubts existed in the minds of the profession as to the power of a married woman to bind her property, except in extreme cases, where equity intervened and made certain valuable betterments added to their separate estates a charge thereon. In cases where married women had exe-
285 cuted contracts for the sale of their lands and had received the purchase price and then refusing to convey, grave doubts existed as to whether courts of equity could even restore the money, and no doubt existed in the minds of the profession as to the question that she could not be compelled to perform specifically such contracts.

To remedy these evils and to make married women's contracts effectual and, as was well put by one of the counsel, as honest as men, the law of 1879 was passed, section 4 of which provides that no * * contract made by a married woman for the sale of her lands or any interest therein * * shall be valid unless her husband shall join therein, page 160, acts of '79. It follows, as certain as night follows the day, that if no contract for the sale of lands made by a married woman should be valid unless her husband joined in the contract, that if he did join in the contract then such contract was valid, for it is elementary that in the construction of statutes necessary implications have the same force as positive enactments. The writer of this belief, for himself, has no hesitancy in saying that he believes the statute to be broad enough to cover parole contracts by the wife for the sale of her lands in which her husband joins by parole and where possession is given to the purchaser. Possession taking the contract out of the statute of frauds, it may be enforced if her husband joins in it, as though in writing. One may join in a contract by parole as well as if it were reduced to writing and his name was subscribed thereto. A liberal interpretation of the statute necessarily leads to this conclusion. It is not not necessary though in constructing this statute to carry the construction that far; in this instance the contract, acquiescence, and express stipulation made by Mrs. Forsyth is in writing and her husband has duly joined therein. As substantiating our view of this law we respectfully call atten-
286 tion to sec. ——, page 527, of our new code, which goes much further and is much more positive than the statute under consideration. This is important only in showing what was intended by the Legisla*tion* in the passage of the law of 1879. By section 2 of the act of 1881 the Legislature of this State declared that a married woman shall not enter into any executory contract to sell, convey, or mortgage her real estate, nor shall she sell, mortgage, or convey

the same unless her husband join in such contract, conveyance, or mortgage, but that with reference to her separate estate she shall direct the same as if she were unmarried; in other words, she is made a *femme sole* as to her separate estate, with the single limitation that when she attempts to enter into an executory contract to sell or mortgage her lands her husband shall give his consent to the obligation or contract. This goes very for to maintain our views as showing what the legislative intent was in the passage of those statutes.

It is contended that on the 1st of July, 1881, when the first payment was not made, as, in the preliminary contract provided, the contract should be void. It it also contended that it was of the essence of the contract, and that the bill showed no excuse for the non-compliance with this covenant.

It is respectfully submitted, and in the amended bill herewith filed it is shown, that a suit is and was on that day pending against the Forsythes by Adams and others, as complainants, to foreclose a mortgage on the land in controversy for a large sum of money, viz, for $160,000 and upwards; that the Forsythes had set up some defense against the foreclosure proceedings, so that it was impossible for the complainants in this suit to know, ascertain, or determine what amount was due on that mortgage to the complainants to that bill. It is further shown that the Forsythes refused and prevented the complainants to this bill from measuring or ascertaining the
287 acreage of the Forthsythe estate. It is further shown by the bill that the Forsythes refused to accept of a large sum of money tendered in part payment of the purchase price of the lands, and refused, generally, to do or perform the covenants which they were bound to perform by the terms of the preliminary contract. It is further shown by the bill that the complainants have ever been ready and willing to perform their part of the contract and were willing so to perform them on and before the 1st day of July, 1881. They further now offer by the bill to bring into court and tender to the defendants, Forsythe, the first installment of the money due, and to have the same applied by the court so that their title may be protected and the land cleared and freed from the lien of the mortgage, which is now sought in said other suit to be foreclosed against it. This is certainly a compliance with the terms of the contract, and the bill is no longer liable to that objection.

It is contended by counsel for the defendants that by the terms of the power of attorney, even if adopted by Mrs. Forsythe, Petherick was not authorized to sell the Forsythe estate for anything but money, and that by the terms of the preliminary contract it is affirmatively shown that certain payments were to be made in certificates of stock issued by a company then formed or to be formed. We respectfully submit that the letter of instructions of Oct. 28th, 1880, now exhibited with the amended bill, is a complete answer to this objection. It will be seen by this letter of instructions that Mr. Forsythe, speaking for himself and his wife, agreed to take the sum of $175,000 in cash and the residue in shares of stock, whereas by the preliminary articles exhibited with the bill it is shown that the

Forsythes were to receive $250,000 in cash, or $75,000 more than the letters of instruction gave them. Certainly the defendants to this bill cannot be heard to complain of this benefit and ad-
288 vantage, which they were to receive by the preliminary contract over that which they agreed to take by their letters of instruction.

In the amended bill it fully appears that at the time of filing the original bill the East Chicago Land and Docks Company was not a legal entity; that the formation of the company and its registration or incorporation was contemplated, and that the plaintiffs, Charles Edward Tremearne, John Studdy Leigh, and Edward Payne, were the persons who intended to incorporate themselves into that company; that they were the persons in interest, and, upon the legal formation of that association or incorporation, would be the beneficiaries and owners of the benefits and rights conferred by the contract.

It further appears by the amended bill that Mr. Tremearne and Mr. Leigh are resident of the city of London, England, and that Mr. Payne is a resident of the city of Chicago, Illinois.

It further appears that at the time of filing this amended bill it is not definitely ascertained or known whether the incorporation of the dock company named in the contract has been perfected so that it may sue and be sued as an artificial person in law, but it does appear by the bill that the parties named as complainants are the true and only parties in interest, and that whatever may be the result of the formation of the corporation to take and hold this land that these persons are the persons to be benefited thereby and have and possess whatever benefits or advantages that are granted under the contract. In this view of the case we take it that a court of equity will always protect the rights and interests and property of *cestui que* trusts whether it be necessary for them to sue in their own names or in the name of the parties that otherwise would represent them.

Resp't'y,

DEPFUHL, ARMSTRONG, HARRIS & CALKINS,
Solicitors, &c.

289 The plaintiffs on receiving copies of said amended bill and said brief were unable to give the same proper attention and furnish a written argument in opposition thereto in time to be presented to the court on Tuesday, the 8th of November, and telegraphed to McDonald & Butler to examine the brief and amendment and reply to the points if necessary, and if deemed advisable have the matter kept open until the 11th or 12th of November.

The plaintiffs and the defendants at that time were making arrangements to be present at Indianapolis on the 11th of November, in connection with the sale of the said Forsyth estate under the contracts with Joseph P. Ord.

On the 11th of November one of said plaintiffs, J. R. Doolittle, Jr., was at Indianapolis and had a conference with Joseph E. McDonald in regard to the said cause, Mr. McDonald informing said plaintiff that nothing further had been done in regard to the disposition of

said cause, but that the complainants, Leigh and others, had prepared an amended bill and would soon apply to the court for leave to file it. Said plaintiff suggested to Mr. McDonald that the defendants had better oppose the filing of the amended bill, but that, if the court should consent to the filing of the bill, an order should be entered requiring the complainants, who were all non-residents of Indiana, to file security for costs, and stated to Mr. McDonald that he did not believe such security would be forthcoming.

On the 16th of November the plaintiffs received a communication from McDonald & Butler on this subject, as follows:

PL'FF'S EX. 92.

"INDIANAPOLIS, IND., *Nov. 15th*, 1881.

"Doolittle & McKey, att'ys-at-law.

290 "GENTS: We called up the case of Tremearne *vs.* Forsyth *et al.* in the Federal court this morning. The judge thought, under the circumstances, that the complainants ought to be permitted to file their amended bill, and required them to consent that the demurrer on file should be refiled to the bill as amended, and the demurrer set down for argument for Saturday or early next week. This was done—Gov. Baker, of the firm of Baker, Hoard & Hendricks, appearing for the new purchasers. We then took a rule against complainants for security for costs, which their attorneys promised should be filed. We will see that they do it. * * *

"With respect, McDONALD & BUTLER."

One of said plaintiffs left Chicago for Indianapolis, reaching there Nov. 21st.

The demurrer came up to the amended bill. Mr. William H. Calkins argued for the bill, and Gov. Baker, of Baker, Hoard & Hendricks, as a volunteer on behalf of the East Chicago Improvement Company, spoke in support of the demurrer. Mr. McDonald and said plaintiff spoke briefly on the same side. The argument consumed several hours, and was brought to a close by the court, who announced his determination to sustain the demurrer. The judge stated from the bench that, without passing upon all the questions raised upon the argument, he was convinced that the complainants were not in a position to bring a suit for the specific performance of the contract between Petherick and Tremearne. He announced that under the contract the East Chicago Land and Dock Company was the only party which could apply to a court of equity for the enforcement of the contract.

Mr. Calkins, on behalf of the complainants, asked further time to consider whether the bill should be still further amended, and the court announced that one week's time should be allowed
291 to Mr. Calkins for that purpose.

On the 29th of November the following decree was entered in said cause:

IN PL'FF'S EX. 54.

"And afterwards, to wit, at the November term of said court, on the 28th day of November, A. D. 1881, before Honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

"And now here the complainants come by their solicitors, and the defendants also come by their solicitors, and the complainants having failed to present to the court any amendment to their bill, since the order granting them leave so to do made in this cause at the present term of this court, and the court being sufficiently advised as to the disposition that ought to be made of the demurrer heretofore filed by the defendants to the complainants' bill of complaint.

"It is therefore ordered, adjudged, and decreed by the court that the matters and things stated and set forth in the complainants' bill of complaint do not entitle the complainants to any equitable relief whatever against the said defendants, Caroline M. Forsyth and Jacob Forsyth, or against either of them; and it is therefore ordered, adjudged, and decreed that the said demurrer of the said defendants to the complainants' bill of complaint be, and the same is hereby, sustained, and the said bill is dismissed; and that the complainants pay to said defendants the costs and charges by the said defendants herein expended, taxed at ——; all of which is finally ordered, adjudged, and decreed.

"To which ruling and decision of the court the plaintiffs except, and pray an appeal to the Supreme Court of the United States, which is granted upon filing bond in the sum of $1,000.00, to be approved by the court."

292 Hypothetical statement No. 5 is as follows:

1.

Upon the assumed facts hereafter hypothetically stated as follows, to wit:

Under certain contracts between the defendants and one Joseph P. Ord, concerning the sale of the property of the defendants known as the Forsyth estate, it was stipulated that in case the purchase of said estate should be completed, and a mortgage to secure a deferred payment for two-thirds of a million of dollars should be given by the purchaser, there should be no personal liability on the part of the person executing the mortgage for the payment of the amount secured by said mortgage.

The plaintiffs were charged by the defendants with the duty of drafting said mortgage in accordance with the terms of said contracts in a manner satisfactory to the counsel of the purchaser.

They had several interviews with the counsel of the purchaser, Mr. A. B. Mason, between the 11th of October, 1881, and the 1st of November, 1881, on the subject of said mortgage. In one of said interviews said Mason objected to the proposition that the purchaser should warrant the title in the mortgage.

On the 20th of October, 1881, the plaintiffs wrote said Mason as follows:

"I return you herewith the proposed forms of deed and mortgage in the Ord-Forsyth matter with some suggestions and modifications. I think the mortgage should contain the same warranty of title as the deed. It is usual and, I think, proper. The Pierson mortgage is no impediment to such a warranty by Ord, because that will be provided for by the deposit of the indemnity money, and if that should fail Ord could recoup on the unpaid installments based upon Mrs. Forsyth's warranty of title."

On the 21st of October the plaintiffs received the following letter:

293 PL'FFS' EX. 109.

"CHICAGO, *October* 21, 1881.

"MY DEAR SIR: I return herewith the mortgage form with some slight corrections. If these are satisfactory to you, I will have the papers engrossed for Mr. Forsyth at once.

"Very truly, yours, ALFRED BISHOP MASON.

"Hon. J. R. Doolittle, Jr."

And the plaintiffs replied thereto, on the same date, as follows:

IN PL'FFS' EX. 45.

"In regard to the question of interest and the payments hereafter to be made I have made a computation, based upon the assumption that the deeds will be exchanged Nov. 10, the results of which I give below:

"Oct. 24th	$2,475 00
"Nov. 8th	2,475 00
"Nov. 9, one day	165 00
"Nov. 10	323,333 33

"On January 1, 1882, there would be due as interest on $666,666,67 from June 10, 1881, 6 mos., 20 days, $22,222.22, less the interest on said sum already paid from and including Sept. 10 to and including Nov. 9, —, 61 days, amounting to $6,777.77, leaving the interest payment due Jan. 1, 1882, $15,444.45.

"As to the matter of a rebate on the interest payment due Jan. 1, 1882, equal to the interest on that portion of the payments of $2,475 which must be applied as interest on $666,666.67 from the time of such payments, respectively, until Jan. 1, 1882, the contracts are silent. I am not clear as to the proper construction.

"Yours, very truly, J. R. DOOLITTLE, JR.

294 "Alfred Bishop Mason, Esq., 40 Dearborn St.:

"I return you the mortgage. I am satisfied with it, except as to the interest payment due Jan. 1, 1882, and as to that I have expressed myself herein."

On the 22d of October the plaintiffs received the following letter:

PL'FFS' EX. 110.

"CHICAGO, *October* 22, 1881.

"Hon. J. R. Doolittle, Jr., city:

"DEAR SIR: I am willing, I think, to accept the mortgage as now drawn. In order to have the two deeds engrossed it is absolutely necessary to know what property is withdrawn and what is added to make up the deficiency. Please press this point, and let me know as soon as you can what the remainder of the substituted descriptions are.

"Yours, sincerely, ALFRED BISHOP MASON."

On the 31st of October the plaintiffs received the mortgage engrossed from Mr. Mason, who, at the request of the plaintiffs, had made arrangements for the engrossing thereof.

On the 1st of November said plaintiffs gave to said instrument a careful and thorough examination, going over the descriptions contained therein and all of the clauses and provisions of said mortgage with great care, comparing the descriptions with the contracts executed by the defendants to said Ord, and also with a map of said property, making several corrections therein, and returned said mortgage to said Mason to be re-engrossed.

Said mortgage is as follows, omitting the descriptions of the land:

295 PL'FFS' EX. 115.

Mortgage.

This indenture, made this tenth (10th) day of November, in the year of our Lord one thousand eight hundred and eighty-one (1881), between William W. Green, of Palisades township, in the county of Bergen and State of New Jersey, and Caroline M. Forsyth, of north township, in the county of Lake and State of Indiana, party of the second part, witnesseth: That whereas the said William W. Green has bought of the said Caroline M. Forsyth and Jacob Forsyth, her husband, the lands hereinafter described for the sum of one million dollars ($1,000,000), and has paid thereon the sum of three hundred and thirty-three thousand three hundred and thirty-three dollars and thirty-three cents ($333,333.33), leaving the sum of six hundred and sixty-six thousand six hundred sixty-six dollars and sixty-seven cents ($666,666.67) to be paid at the times and in the manner following, to wit, one hundred thousand dollars ($100,000) on the first day of January, A. D. 1883; one hundred thousand dollars ($100,000) on the first day of January, 1884; one hundred thousand dollars ($100,000) on the first day of January, A. D. 1885; one hundred thousand dollars ($100,000) on the first day of January, A. D. 1886; one hundred thousand dollars ($100,000) on the first day of January, A. D. 1887; one hundred thousand dollars ($100,000) on the first day of January, 1888, and on the first day of January, A. D. 1889, the sum of sixty-six thousand six hundred and sixty-six dollars and sixty-seven cents ($66,666.67), with interest

on each and all of said installments which remain unpaid at the rate of six per centum per annum, payable semi-annually on the first days of January and July in each year hereafter until each and all of said installments of principal shall have been fully paid, said interest to be computed from the tenth (10th) day of June A. D. 1881, the first payment of interest being due on the first day
296 January, A. D. 1882, and amounting to fifteen thousand four hundred and forty-four dollars and forty-five cents ($15,444.45.)

It is further provided that the party of the first part, his heirs, legal representatives, or assigns, may pay all or any portion of said indebtedness before maturity, after 15 (fifteen) days' notice of such intended payment, which notice may be served on Caroline M. Forsyth or Jacob Forsyth or J. R. Doolittle, Jr., giving to the party of the second part, her legal representatives or assigns, the right and opportunity to name the place of payment, as hereinafter provided.

Said principal and interest sums are payable at the office of the Mercantile Trust Company of New York, in the city of New York, but the said Caroline M. Forsyth, her executors, administrators, or assigns, may from time to time direct the payment of particular installments of principal and interest in the city of Chicago, Illinois, or city of Indianapolis, Indiana, by giving the party of the first part fifteen days' notice, in writing, before such installment shall be payable, specifying some bank in the city of Chicago or city of Indianapolis as the place of payment, the expense, if any, of making such payment at the place indicated in such notice instead of in New York to be charged to said Caroline M. Forsyth and deducted from the amount of the payment.

All payments under this indenture may be made in certified checks, drawn upon any bank in the city of New York or in the city of Chicago aforesaid, or in the certificates of deposit issued by the Mercantile Trust Company of New York and duly indorsed, but the party of the first part or his assigns will be held to guarantee the payment of all such checks or certificates of deposit on presentment, if presented in due course of business, and unless paid when so presented shall not be treated as a payment.

297 It is hereby expressly declared and agreed by and between the parties hereto that the purpose and intent of this mortgage is merely to create and enforce a lien upon the lands herein mentioned in favor of the vendor, Caroline M. Forsyth, her executors, administrators, and assigns, for the unpaid purchase-money thereof and the interest thereon, as hereinbefore set forth, without creating any personal obligation whatever against the said William W. Green; and it is expressly covenanted and agreed that the said Caroline M. Forsyth, her legal representatives and assigns, shall have no right of action against the vendee of said premises or the mortgagor thereof, personally, or against the heirs, executors, administrators, or assigns of the vendee or the mortgagor, for any part of the purchase-money of said lands or the interest thereon, but that the said mortgaged lands are to be treated as the sole fund or security

for the payment of said purchase-money and interest, anything in this instrument or elsewhere to the contrary notwithstanding.

Now, therefore, this indenture witnesseth that the said party of the first part, for better securing the payment of the moneys aforesaid with interest thereon, and also in the further consideration of one dollar to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, doth by these presents give, grant, bargain, sell, convey, and confirm unto the said party of the second part, her heirs and assigns, forever, all the premises situate in the county of Lake and State of Indiana, known and described as follows:

This conveyance is made subject to existing highways and railroad rights of way upon and across various portions of said land, together with the rents, issues, and profits thereof and all buildings and improvements now on said premises or that may
298 hereafter be erected thereupon or on any part thereof, to have and to hold the premises hereby conveyed, with all the privileges and appurtenances thereunto belonging, unto the said party of the second part, her heirs and assigns forever.

And the said party of the first part, for himself and his heirs, executors, and administrators, doth covenant and agree with the said party of the second part, her heirs and assigns, that he is lawfully seized of the premises hereby conveyed in fee-simple; that the same are free and clear of and from all incumbrances of every kind whatsoever; that the said party of the first part has good right and lawful authority to sell and convey the same to the said party of the second part as aforesaid; that he will, and his heirs, executors, and administrators shall, the premises hereby conveyed in the quiet and peaceable possession of the said party of the second part, her heirs and assigns, against all and every person or persons lawfully claiming or to claim the same or any part thereof, warrant and forever defend:

Provided, nevertheless, and these presents are upon the express condition, that if the said party of the first part, his heirs, executors, administrators, or assigns, shall well and truly pay, or cause to be paid, to the said party of the second part, her heirs, executors, administrators, or assigns, the principal money herein mentioned, with the interest thereon at the time and in the manner herein specified according to the true intent and meaning hereof, and well and truly observe and perform the covenants and conditions herein contained, then this indenture and everything herein expressed shall be absolutely null and void.

And the said party of the first part further covenants and agrees to pay or cause to be paid all taxes and assessments levied or assessed on said premises while said moneys or the interest thereon remains unpaid, and in case said taxes or assessments are
299 paid when due it shall be optional with the said party of the second part, or her legal representatives or assigns, at any time to pay and discharge said tax or assessment or to redeem the said premises or any part thereof which have been or may be sold

or forfeited at any tax sale for taxes or assessments due or to become due thereon, or to purchase any outstanding title acquired by any deed or tax certificate arising from any past or future tax sale, or forfeiture of said premises, or any part thereof, without notice to the said party of the first part, and the amount of money so paid shall, with interest at the rate of six per cent. per annum in addition thereto, be added to the payment which shall next thereafter become due on said lands.

And it is stipulated and agreed that, in case of thirty days' default in any of said payments of principal or interest as aforesaid, then and in that case the whole principal sum hereby secured and the unpaid interest thereon shall, at the option of said second party, her legal representatives or assigns (with notice thereof to said party of the first part, his heirs, assigns, or legal representatives), become at once due and payable. It is provided that the deposit of such notice in the business office of the Mercantile Trust Company in the city of New York, addressed to said party of the first part, shall be a sufficient service of such notice upon said first party, his heirs, executors, and assigns, and shall be notice to all persons claiming or occupying said lands, or any part thereof, from or under him by deed, lease, or otherwise, and, after the exercise of such option, [the] second party, her legal representatives or assigns, may elect to revoke the same and may receive any portion of said indebtedness hereby secured, and the rights of the said party of the second part hereunder shall thereafter remain in full force, and be the same as to the remainder of such indebtedness, or any part thereof, as if such option had not been exercised, and said second party, her legal representatives or assigns, shall have the right to exercise such option and revoke the same in like manner from time to time; in case of any such default aforesaid the rights of said party of the second part remaining the same after any such revocation as if such option had not been exercised.

In case a suit shall be commenced to foreclose this mortgage, which shall be foreclosed only by suit, the court may, on motion of complainants' solicitor in such suit, appoint a suitable person receiver to collect the rents, issues, and profits of the premises hereby conveyed until the expiration of the time of redemption of said premises according to law, to be applied towards the payment of the indebtedness secured hereby, and the taxes, costs, and expenses of foreclosure proceedings and the payment of any taxes or assessments or the removal of any tax or assessment liens on the property hereby conveyed, and in rendering a decree the court may also allow the complainants in such suit, his, her, or their reasonable solicitor's fees for conducting such foreclosure proceedings, and the amount so allowed shall be taxed as part of the costs and included in the decree rendered in such suit, but said decree shall be rendered only against said mortgaged premises, and no personal decree shall be made against the said mortgagor, his legal representatives, or assigns.

And the said party of the first part hereby expressly waives and releases any and all right, benefit, privilege, advantage, and exemption in the lands and premises herein described under and by

virtue of any and all statutes of the State of Indiana providing for the exemption of homesteads from sale, on execution or otherwise, and also all relief from the valuation or appraisement laws of the State of Indiana.

In witness whereof the said party of the first part hath hereunto set his hand and seal the day and year first above written.

301 Upon the foregoing statement of facts, assumed hypothetically to be true, what, in your opinion, would be a reasonable, usual, and customary fee for the services of the plaintiffs in respect to the drawing of said mortgage?

302 Counsel for defendant objected to the question or questions contained in five parts, as above set forth, and to each and every one of those parts as follows:

That they are, and each of them is, of a structure wholly incompatible with any just conception of a proper hypothetical question; that the question is replete with absolute assertions of fact; that the questions extend into the domain of pure speculation; that the great body of the questions partake more of the character of a high-sounding prologue than of a plain, simple, comprehensive question to be put to a witness, even though a lawyer, in a trial before a jury. The questions not only abound with strong adjectives and many oratorical and rhetorical expletives, but embody a vigorous argument of the great magnitude of the services which the plaintiffs have rendered for the defendant in the rescuing of the defendant from impending perils, and the questions were read before the jury with rhetorical and dramatic flourishes and intonations, with the evident intention of influencing the jury. The questions partake much more of an argument to the jury than hypothetical questions; that the length of the questions (the five parts occupying 225 pages of any of our standard law reports) renders them objectionable, and it ought not to be allowed or tolerated; that the witness is not shown to have been competent to testify to the value of the services rendered, as mentioned and referred to in the question, and also is not competent to testify to the value of the services of the plaintiffs as negotiators, but only to the value of legal services; that the questions are presumably addressed to lawyers as experts, and from their construction are evidently intended to influence the jury; that pleadings, bills in chancery, answers, and other papers are set out

303 in *hæc verba;* the lawyers to whom the questions are addressed and presented are presumed to know what a bill in chancery, answer, or other pleadings should contain without setting them out in *hæc verba.* The manner of the reading of the questions to the jury, with the rhetorical manner of their being read, is sufficient to show that they were intended for the jury, rather than questions for the lawyers. The rise and fall and pitch of the voice, and the flourish of the right hand, right in the presence of the jury, is sufficient to exclude them, if there were nothing else; that the questions are not proper to be put to any witness, and especially to this witness; that the questions are, and each of them is, irrelevant, immaterial, improper, and incompetent, and for each and every one of these reasons

ought to be excluded; that a large portion of the questions are based upon assumptions contrary to the facts.

The court thereupon, in the presence of the jury, gave his decision substantially as follows:

The jury will be told, in the charge of the court, that they are to take the facts as proven by the witnesses, and not as stated in the hypothetical questions. And, therefore, I do not think that any injury can accrue to the defendant from the elaborate statements of fact in the hypothetical questions, or the manner of the counsel in reading them. They are merely a method of telling the witness what the plaintiffs claim to have done, and then asking the witness' opinion of the value of the services so claimed to have been done. But the jury will be told, in the charge of the court, that they must ascertain what the plaintiffs have done, and ascertain it from the evidence, and not from the statements in these hypothetical questions, or in the arguments of counsel.

304 Said objections, and each and every of them, being thus overruled by the court, counsel for defendants then and there duly excepted.

Thereupon this witnessed answered: I have heard, perhaps, three-quarters of hypothetical question No. 1 read; have skimmed over the balance at my office; have heard read hypothetical questions 2, 3, 4, and 5. I have not divided the services; have lumped all the services embraced in the five statements or questions.

By the COURT:

The witness having read the first statement and listened to the reading of the others can, if he chooses, give his opinion as to the value of all the services, without dividing it.

The witness then said: In answering this question, without having personal knowledge of the facts, I assume that the facts embraced in these hypothetical questions are true. Shortening them, I assume this to be true: That Mrs. Forsyth was the owner of about 8,000 acres of land southeast of the city, upon which there was a mortgage of $163,000, with interest added, and other claims added, which was in process of foreclosure when these plaintiffs were retained, and one of their duties was to defend and stave off and get time on the mortgage until something could be done with the land.

I assume also that Mr. Forsyth—the title of the land being in Mrs. Forsyth—had executed a power of attorney to some man in England to sell this land, and Mrs. Forsyth had written a letter saying, in substance, that she stood up to her husband, and a pretended sale had been made under that power of attorney, which was brought in as a cloud on this title. I assume also that the parties in interest had made a contract with some gentleman to sell this land, and were to give him $50,000 commissions out of
305 the proceeds of the sale, and, as they went along in the negotiation, the services of that man proved to be useless, and yet he was in a condition that he might get the money; that under the

circumstances the plaintiffs here defended the suit on the mortgage, staved it off, getting time while they could negotiate a sale of the land; that there was some complication in regard to the sale of the land at first by the contract, but the end of it was that with the cloud made by the Englishman standing over it, and the mortgage existing and not disposed of, they succeeded in making negotiations for a sale of this land by which the plaintiffs got $333,333 and a mortgage on the land for all the balance of *his* money, and that out of this enough was taken to put up in court, so that they could file a cross-bill, or bill to redeem, and reduce this mortgage down to its legal amount, and that these parties succeeded in fighting off the Englishman, broke him down, and they, by negotiations, succeeded in reducing the amount of the claim for $50,000 for selling the land to $10,000, and that under these circumstances they perfected this sale for a million dollars for the land, and got actually in cash $333,333, and got a mortgage for the balance of it—a mortgage on the land for all the balance—making a million dollars altogether.

Now, I would rather not say what I think that service is worth, but say I think it is worth, at least, $50,000. And the reason I say it is this: I believe about fees, generally, they ought to be regulated by contract; and as I have heard this, I have thought over in my mind, situated as Mr. and Mrs. Forsyth at the time were, supposing these plaintiffs had said to them: "I will stave off this mortgage until I can effect a sale for a million dollars. I will get $333,333 in money, and security upon the lands for the back payments.
306 I will break down this Englishman. I will reduce the $50,000 down to $10,000." I assume that if that was said to Forsyth that he would have said: "If you will do that I will give you much more than $50,000." I believe if these parties had said this, and then had said to Mrs. Forsyth: "What will you give me for it?" that she would have fixed a price very much larger than $50,000.

Counsel for defendant objected; that it was not competent for the witness to make such a statement to the jury, and that such statements of the witness were incompetent. Objection overruled by the court, upon the ground, then stated in the presence of the jury, that it was admissible like any other reason which an expert gives to be weighed by the jury; to which ruling counsel for defendant duly excepted.

Witness continuing: Now, in the absence of any special contract, so far as I know, on negotiations of this character, I consider that sum entirely within the bounds of reason under the circumstances of the case. Now, I ought to state that I consider from the circumstances of the case there was great danger that Mr. Forsyth would lose this land altogether by this mortgage. It would be swept away from him, for this mortgage that was outstanding there was great danger that the complications with this Englishman might deter anybody from buying the land with that cloud upon it until the mortgage would just take it and eat it all up. I can say no further than that I consider that is a very reasonable sum. I think I am acquainted with the customary and usual charges for legal services

and in litigations of this kind. I have known one larger negotiation, never but one as large, complicated, intricate, and successful as this one.

307 ROBERT HERVEY testified:

Practiced law 40 years; in Chicago 30 years; have been present during most of the trial. I have read, or heard read, the five hypothetical questions in this case. I have heard all the testimony of James R. Doolittle, Jr., in regard to the services rendered. I am acquainted with the usual and customary fees for services of the character described in the testimony and in the hypothetical questions. (Being the same as referred to and shown in the testimony of Leonard Swett.)

Question by PLAINTIFFS' COUNSEL: What, in your judgment, were the services rendered reasonably worth?

Objection by counsel for defendant to the witness testifying from what he had heard of the testimony, and the same objections as above set out to the five hypothetical questions, in the objections to the hypothetical questions propounded to Leonard Swett, and also objection to this witness' answer to the same. Objections overruled, to which ruling counsel for defendant then and there duly excepted.

The WITNESS: I should say that the services which I have heard detailed by Mr. Doolittle, Jr., on the witness stand, in conducting the negotiations culminating in this large sale to Mr. Ord, meeting the objections which Mr. Doolittle had to meet, overcoming them, details of which I have heard *in extenso*, which, to my mind, were of a very formidable character as affecting his client—I allude particularly to one service of Mr. Doolittle, in eliminating from the contracts as proposed by Mr. Ord, that Mrs. Forsyth should take payment of the large amount of the deferred payments, two-thirds of a million of dollars in bonds of a company to be formed, at par, without any limitation as to the amount of the bonds
308 to be issued by that company, the value of which would, of course, depend upon the amount of bonds to be issued, and although secured upon the land, if issued in any very large volume, would be, in my opinion, of comparatively small value—might be, according to the amount issued, from ten to fifty cents on the dollar—Mrs. Forsyth being obliged by that contract to take it, whatever amount was issued, at par, securing the elimination from the contract as proposed by Ord, of the right, in case of failure, to pay the two-thirds of a million by reconveying an undivided two-thirds interest in the lands which I should have considered of a disastrous tendency towards Mrs. Forsyth; the securing payment of $10,000 interest for the extension of sixty days, an extension which I gather from the testimony, Mr. and Mrs. Forsyth would have been very glad to have granted on any terms, inasmuch as there seems to me to have been an absolute necessity on their part that this contract should have been carried out in view of the complications attending the title, viz., this foreclosure proceeding for a very large amount, and this attack upon the title by these London parties;

in reducing the Horne contract, which was an absolute engagement, I understand, on the part of Mrs. Forsyth to pay Horne $50,000 for certain services which he agreed to render, or was to render, reducing that from $50,000 to $10,000; in obtaining Mr. Doolittle's construction of the proper amount to be paid as interest on the first payments maturing, as I remember, on the first day of January, 1882, if I mistake not, of some $3,200 more than Mr. Mason's theory claimed would be due, I should say that for these services, including the defense of the Tremearne suit and the ultimate disposition of the Tremearne suit, that five per cent. on the full amount of the purchase-money would, in my opinion, be not an unreasonable compensation.

309 ERASTUS S. WILLIAMS testified:

I have been, either on the bench or a practicing lawyer, for about forty years in Chicago. Have read or heard read the five hypothetical questions in this case. (Said questions or statements being the same as shown in the testimony of Leonard Swett.) I can say I am acquainted with the reasonable and customary charges for such services as are described therein.

Plaintiffs' counsel then asked witness to state what, in his judgment, the services named in these hypothetical questions were reasonably worth, taking them question by question or together, as he chose, assuming, as stated in the hypotheses, that these are the facts.

Same objections by counsel for defendant to the hypothetical questions as heretofore set forth in the objections to the hypothetical questions propounded to Leonard Swett; also objection to the answer of this witness thereto. Objections overruled; to which ruling of the court counsel for defendant then and there duly excepted.

WITNESS: Assuming the facts to be true as they are stated in the hypothetical questions I have an idea of the value of the services. I ought to say, however, in explanation, that I cannot separate the different portions of the services. To me it seems to have been one whole thing, resulting, according to the hypothesis, in a certain highly beneficial result, as I will say, to the defendants. Supposing that hypothesis to be correct the services must have taken up a very considerable time, and so far as I can see from the hypothetical questions they seem to have been rendered with great fidelity and with great discretion in the main. In fact I do not think of anything that I
310 see where it seems to me as if there was any blunder committed.

As I understand, it is claimed on the part of the plaintiffs that, by virtue of the labor which was performed by them and the advice which they gave to their clients, the property, the 8,000 acres in Indiana, which had been covered by mortgage, and which mortgages were about to be foreclosed and were in process of foreclosure, was released entirely from the incumbrance; the incumbrance was all paid up; the property was sold for one million dollars, three hundred and thirty-three thousand three hundred and thirty-three dollars and thirty-three cents of which was obtained in cash, and

nearly $40,000 or more of interest, which was obtained. There was demand, which was made by Horne, which seems to have been recognized as a valid one by Mr. Forsyth, which was reduced from $50,000 to $10,000. There was a very large amount of usurious interest, between $25,000 and $30,000, thrown off as a result of the litigation. Taking in view all these facts, I think the services were well worth $50,000. I would say it was an exceedingly moderate charge, in view of the character of the services and the result, as set forth in the hypothetical questions.

JAMES GOGGIN testified:

Practiced law 16 years. Have read hypothetical question No. 1 and heard all the others read, except No. 5, about drawing of the mortgage. I heard that testified to by Mr. Doolittle on the stand. I am acquainted with the usual and customary charges for services of the kind named in the hypothetical questions.

The witness was then asked by the counsel for the plaintiffs
311 to state his opinion as to the value of the services as stated and described, taken together or separately.

Counsel for defendant objected to the questions for same reasons heretofore given and set forth in objections to the hypothetical questions propounded to Leonard Swett, and also objected to this witness' answer to said questions, and also objected to the witness testifying from what he has heard of the testimony in this case. Objections overruled by the court; to which ruling counsel for defendant then and there duly excepted.

WITNESS: It is almost impossible for me to separate the questions, for the reason that the object of the whole litigation was the consummation of one great result. And I must assume, first, that the legal services, and the business ability, and the legal tact were combined and united to bring about the results that arose from the litigation; not only from the litigation, but from the business negotiation. I have estimated five per cent. on a million dollars to be a reasonable compensation for carrying through the negotiations.

Now, as to legal fees, the fees in setting aside the Horne contract or reducing the contract for the payment of commissions to Horne, that I would not estimate at a greater sum than $10,000. I think it is worth that. Defending in the foreclosure suit of the Pierson mortgage, that, perhaps, would be $2,500; that is, taking into consideration in that case not only the actual litigation and the necessary caution that had to be taken, but in defending a suit of that kind, in procuring the information in the East that tended to show that the notes had never been assigned, and, I infer from the evidence, led to the dismissal of the foreclosure suit. I think $2,500 or
$3,000 would be a very fair and reasonable compensation for
312 that. In filing the bill to redeem and up to the end when they were discharged, I think about $2,000; drawing the mortgage, $500; defense of the Tremearne suit, $1,500 to $2,000. Heard the testimony in regard to claims against Mrs. Forsyth in the

guarantee of notes, $12,000; I think $100 to $150 reasonable for that.

Witness, on cross-examination, was asked by the defendants' counsel, to assume that the deed from Mr. and Mrs. Forsyth to Mr. Green contains this clause, together with "the accretions, water, lake bed rights, and the reversions," and assuming that in the mortgage back the words "accretions, water, and lake bed rights" were omitted, and that these accretions, water and lake bed rights were of the value of $25,000, and then what would you say?

The witness answered: Now, let me say, that in making my estimate as to the value, having read the exhibits, it would not make a great deal of difference in the value of the services in a transaction of this magnitude.

It appeared in the evidence that the deed and mortgage were dated, executed, delivered, and recorded at the same time, between the same parties, as one transaction.

WILLIAM C. GRANT testified:

Practiced law in Chicago about twenty-six years. I was of counsel for the Continental Life Insurance Company, which filed the bill to foreclose against Mr. and Mrs. Forsyth, and of counsel in the defense against the bill to redeem filed by them. I have examined hypothetical questions Nos. 1, 2, and 3. (Said questions being the same as shown in the testimony of Leonard Swett, Nos. 1, 2, and 3.) I am acquainted with the usual and customary charges in such cases.

313 The plaintiffs' counsel then asked the witness: Assuming the facts to be as stated in those three questions, what, in your judgment, would be a reasonable charge or reasonable charges to be made by the plaintiffs against the defendants? In other words, what were those services reasonably worth? You can take the questions separately or together, as you choose.

Counsel for defendant- objected for the reasons stated in the objections to the hypothetical questions in the examination of Leonard Swett, and also objected to witness' answer thereto. Objections overruled. To which ruling counsel for defendant- then and there duly excepted.

WITNESS: Assuming the facts as stated in the three questions, my judgment is that in the foreclosure and bill to redeem a charge of $5,000 would be very reasonable. Assuming the facts stated in the hypothetical question No. 2, it appeared that the services, as stated in the question, were performed in the matter of the removal of the Horne contract, or the reduction of the commissions in that case from $50,000 to $10,000. That would be worth at least $10,000. I should say that 25 per cent. in such a matter would be reasonable; 25 per cent of the amount saved. And in the other matter of the sale of a large amount of property for a million dollars, securing one-third of that amount to be paid in cash, under the peculiar cir-

cumstances of the case, that ought to be worth from $25,000 to $40,000.

THOMAS HOYNE testified:

Practiced law in Chicago since 1839; have read over hypothetical questions 1 and 2. I am ordinarily acquainted with the
314 usual and customary charges for services of the kind described in the questions.

Thereupon the witness was asked to state what, in his judgment, the services set forth in the hypothetical statements 1 and 2 were reasonably worth.

Counsel for the defendant- objected to the questions, for reasons given in the objections to the hypothetical questions in the examination of Mr. Swett, and also objected to witness' answer thereto. Objections overruled by the court; to which ruling counsel for defendant then and there duly excepted.

WITNESS: I would say, judging in that case from the character of the professional men engaged, their long experience and position, from the very large amount of money involved in the land in controversy, and from considering the services in the twofold character of legal as well a land negotiation or agency, I should say that the services were worth from $40,000 to $50,000. I should say that, judging from the circumstance as they are, assuming them, of course, to be true and as stated in these two statements.

HENRY S. MONROE testified:

Practiced law in Chicago about 25 years; have read hypothetical questions Nos. 1, 2, 3, 4, and 5 in this case. (Said questions being the same as shown in the testimony of Leonard Swett.) Am acquainted with the usual and customary charges for services of the character described in them.

The witness was then asked to state what, in his judgment,
315 the services were reasonably worth, taking them together or separately.

The counsel for the defendant- objected to the questions and to the answer of the witness, for the same reasons as before stated in the objections to the hypothetical questions in the testimony of Leonard Swett. Objections overruled by the court; to which ruling counsel for defendant then and there duly excepted.

WITNESS: Part of the services that were rendered as described in the hypothetical questions were perhaps unusual to a general practitioner, but I have an idea of them; taking all the services rendered as detailed in all those hypothetical questions $50,000 would be very reasonable. $60,000 would not be excessive.

The answers of the witnesses, Leonard Swett, Robert Hervey, Erastus S. Williams, James Goggin, William C. Grant, Thomas Hoyne, Henry S. Monroe, and William C. Gulliver, respectively, to the said hypothetical questions propounded by plaintiffs' counsel

were severally duly objected to by counsel for defendant-, and the objections were each and all overruled by the court; to which ruling of the court counsel for defendant- then and there duly excepted.

Exhibit A, introduced by the defendant-, is the contract of May 11 to Milton Weston, and is as follows:

316 Articles of agreement, made this eleventh day of May, in the year of our Lord one thousand eight hundred and eighty-one, between Jacob Forsyth, of north township, county of Lake and State of Indiana, party of the first part, and Milton Weston, general manager of the Chicago Belt Line Railroad Company and of the East Chicago Improvement Company, party of the second part:

Witnesseth that if the party of the second part shall first make the payments, and perform the covenants hereinafter mentioned on his part to be made and performed, the said party of the first part hereby covenants and agrees to convey and assign to the said party of the second part, in fee-simple, clear of all incumbrances whatever, by a good and sufficient warranty deed, the lot, piece or parcel, of ground situated in the county of Lake and State of Indiana, known and described as follows:

(Description omitted.)

Containing in all eight thousand acres, more or less, being all the land owned in said county by said party of first part; and the said party of the second part hereby covenants and agrees to pay to the said party of the first part the sum of one million dollars in the manner following: One-third of said sum in cash, to be paid within sixty days from the date hereof, and the balance in first-mortgage
317 bonds of the East Chicago Improvement Company, said bonds to be payable in twenty years, to be secured on the lands herein described, with interest at the rate of six per centum per annum, payable semi-annually, on the whole sum remaining from time to time unpaid, and to pay all taxes, assessments, or impositions that may be legally levied or imposed upon said land subsequent to the year 1880; and in case of the failure of the said party of the second part to make either of the payments, or any part thereof, or perform any of the covenants on his part hereby made and entered into, this contract shall, at the option of the party of the first part, be forfeited and determined, and the party of the second part shall forfeit all payments made by him on this contract, and such payments shall be retained by the said party of the first part in full satisfaction and in liquidation of all damages by him sustained, and he shall have the right to re-enter and take possession of the premises aforesaid.

It is mutually agreed by and between the parties hereto that this agreement is not to be considered binding until the above first payment is made in cash; and further, that this agreement is not to be placed on record, or to be used in any way to cloud or encumber the title to the above-described land, and that said first payment must be made before the expiration of the said sixty days, and cannot be made thereafter.

And it is further agreed that this agreement may be terminated at any time by giving ten (10) days' notice in writing by the party of the first part to the party of the second part, said notice to be left at room 26, Ashland Block, in the city of Chicago, Illinois.

It is mutually agreed by and between the parties hereto that the time of payment shall be an essential part of this contract, and
318 that all the covenants and agreements herein contained shall extend to and be obligatory upon the heirs, executors, administrators, and assigns of the respective parties

In witness whereof the parties to these presents have hereunto set their hands and seals, the day and year first above written.

JACOB FORSYTH. [SEAL.]

Sealed and delivered in the presence of—
MILTON WESTON,
By D. H. HORNE,
His Attorney-in-fact.

319 DANIEL H. HORNE, on behalf of the defendant-, testified that he had a conversation with Mr. Barnum, June 24th in Chicago. He wanted to know if the contract with Mr. Forsyth had been signed and sent on and the $10,000 paid. He was anxious before he went East to know the fact. Told him it had been signed and the money had been paid. He expressed great satisfaction.

On motion of counsel for plaintiffs, the above conversation with Mr. Barnum, it not appearing that either plaintiff was present, was excluded by the court and ordered to be stricken out; to which ruling of the court counsel for defendant- then and there duly excepted.

Counsel for defendant- then offered to prove by the witness that Mr. Ord expressed to witness great satisfaction with the land, and said that it was the biggest purchase they had made, and that they would make more money out of that than any other purchase they had made or contemplated; that this conversation was on the 14th day of July.

Objected to by counsel for plaintiffs, it not appearing that either plaintiff was present. Objection sustained; to which ruling of the counsel for defendant- then and there duly excepted.

The respective parties having rested the evidence was summed up by their counsel to the jury, whereupon the court charged the jury as follows:

320 This is an action by plaintiffs to recover compensation for service alleged to have been rendered by plaintiffs to defendants as negotiators and attorneys in securing the sale of a tract of about 8,000 acres of land, lying about sixteen miles southeast of the central part of the city of Chicago, and for services in certain suits mainly relating to the title to said lands. The proof in the case tends to show, and is not contradicted in this particular, that the land in question lies in the northwest corner of the State of Indiana, upon the southern margin of Lake Michigan, is intersected by sev-

eral small lakes or bayous, and consists mainly of low sand ridges and grassy swales; that only a small fraction of it is fit for agricultural purposes, and that its chief element of value is its adaptability, by reason of its close proximity to the city of Chicago, to improvement by the construction of a harbor, docks, and other business facilities for various commercial and business uses, such as lumber yards, manufactories, slaughtering and packing houses, &c., as a business suburb of the city of Chicago. The value of the land is immaterial to the questions in this case, but I was of opinion, and am so still, that the character of the land and the uses to which it is adapted or for which it is likely to find a purchaser are elements which might in some degree aid you in passing upon the material facts, and, therefore, this proof was admitted.

The title to this land, it is admitted, was in Mrs. Forsyth, who is the only defendant served with process or who has appeared in the case, and it also appears that she and her family during the latter part of 1880 or first part of 1881 *was* desirous of selling the property.

In the month of April, 1881, an enterprise, called the Belt
321 Line railroad, was set on foot, the chief management of which for the first few months seems to have been in the hands of a Mr. Milton Weston, and in the month of April negotiations began between Mr. Forsyth and Weston, through a Mr. Horne, for the sale of this property to the parties interested in this Belt Line railroad project, and it is for services in securing the consummation of a sale which had its incipient step in a contract given by Mr. Forsyth to Mr. Weston, dated May 11th, 1881, whereby Weston was given an option to purchase the land for $1,000,000, of which ⅓ was to be paid in cash, and the balance at a future time; that a large portion of the compensation in question is claimed to have been earned.

The proof on the part of plaintiffs tends to show that plaintiffs were consulted as to the terms of this option contract, as it is called, of May 11th, and that they rendered valuable services in framing this contract and in suggesting its terms. It is admitted that the land in question was encumbered by a trust deed from Mr. and Mrs. Forsyth to one Pierson to secure a loan of $100,000 made by Mrs. Forsyth in October, 1875, from the Continental Life Insurance Company of Hartford, Connecticut.

That, by the terms of the loan, the interest was not payable annually or semi-annually, but the annual or semi-annual interest was computed and compounded and added together in such a way as that the whole sum of principal and interest amounted to about $163,000, and became due on the 1st of October, 1880; and it is also conceded that at the time these negotiations for the sale of the land by Weston began a bill in chancery had been filed and was pending in the United States circuit court for the district of Indiana to foreclose this trust deed. The indebtedness thereby secured having become due, and all being unpaid except a small por-
322 tion which had been paid from the Shedd purchase, the whole sum drawing interest after maturity at the rate of 10 per cent.

per annum, and the Forsyths were defending the same on the ground of usury.

The plaintiffs' proof further tends to show that Weston took the contract of May 11th to New York, and then succeeded in interesting others in the proposed purchase, and that J. P. Ord, of New York, was selected as the trustee or representative who was to take the title if the purchase should be made.

With a view to this possible purchase a contract was prepared in New York, signed by Ord, and brought to Chicago by Weston for the purpose of having Mrs. Forsyth sign it, and the plaintiffs' proof tends to show that Weston brought with him to Chicago $10,000, which he was to pay when Mrs. Forsyth signed the contract which had been prepared in New York.

Plaintiffs' proof further tends to show that on the receipt of this Ord contract plaintiffs were consulted by Mr. Forsyth, as the representative of Mrs. Forsyth, and the plaintiffs advised that it should not be signed, and that material and important modifications were, at the suggestion of Mr. J. R. Doolittle, Jr., who was chiefly consulted, made in the contract before they would advise Mrs. Forsyth to sign it.

The important features eliminated from the contract as prepared in New York were, as plaintiffs' testimony tends to show:

First. The clause allowing the purchasers to pay the deferred payment of $666,666.67 by a reconveyance of two-thirds of the land. The Ord contract, as you will remember, as prepared in New York, provided for the payment of one-third of the purchase-money in cash, and that at the election of the party of the second part, Mr. Ord, he might pay the whole of the deferred payment of
323 $666,666.67 by a reconveyance of the land, so as to get one-third of the property by the payment of one-third of the purchase price.

Second. That the title to be conveyed was not to be free and clear of all incumbrances, but was to be subject to the Pierson trust deed; and also as to certain tracts, the buyer was not to object to the title of the seller, but was to take the Forsyths' warranty deed as a sufficient title for the purpose of effecting the sale.

Two new features were also introduced into this new contract before it was signed by Mrs. Forsyth, as the plaintiffs' testimony tends to prove:

First. That Mr. and Mrs. Forsyth were to have the right of reserving a tract of about 120 acres of the land in question from the contract, on giving notice of their election so to do and substituting other lands in place of them, the same amount of acreage.

Second. That the Forsyths were to have the right to carry on the contest in the foreclosure suit on the Pierson trust deed, and that the sum of $205,000—part of the first payment of $333,333.33—should be deposited in the Mercantile Trust Company in New York city as a security to the buyers against this Pierson trust deed, so that the control of the litigation as to the amount really due on this trust deed should remain with the Forsyths, and whatever decree should ultimately be obtained should be paid out of the money so

left with the Mercantile Trust Company. While said funds remained with said Trust Company they were to be invested in 4 per cent. United States bonds, or such other bonds as the parties might agree to, and the balance of the purchase-money, $666,666.67, was to be paid either in cash, in four equal annual installments, with interest at 6 per cent. on the amount unpaid, secured by a first mortgage on the lands sold, or to be paid in 20-year first mortgage 6 per cent. bonds of the East Chicago Improvement Company, se-
324 cured by a mortgage on the lands conveyed, the bonds issued under the mortgage not to exceed the deferred payment of $666,666.67.

Third. That the title was to be examined and accepted within ninety days from the 10th day of June, 1881.

There may have been some other changes made in the terms of the contract, and, as my recollection serves, there were, but I have given those that have been principally discussed, as the testimony tends to show, and subsequently inserted.

The plaintiffs contend that the changes made in the original Ord contract were not acceptable to Ord and his associates; that the contract of June 10th, signed by Mrs. Forsyth, differing so materially from that signed by Ord, there was really then, after the signing of the contract of June 10th by Mrs. Forsyth, no contract between them, and that the Forsyths were liable to refund to Ord and his associates the $10,000 which had been paid over by Weston on the signing by Mrs. Forsyth of the June 10th contract; that growing out of this complication there was a long and protracted negotiation in which Ord and his counsel, Mr. A. B. Mason, and subsequently Mr. Simpson, and Senator Barnum, of Connecticut, participated on the part of the purchasers, and in which the interests of the Forsyths were represented by the plaintiffs, principally by Mr. J. R. Doolittle, Jr.; and that finally the minds of the parties as to the various terms of this option contract of purchase, and the manner in which the notice of election on the part of the purchasers to take or not to take the property and consummate the transaction, were finally settled on or about the 4th of August, 1881, at which time Ord signed the contract of June 10th, and both parties signed the contract of August 4th, which was supplemental to the contract of June 10th.

325 The principal features of this supplemental contract of August 4th were—

First. That the time within which Ord and his associates were to elect to purchase and pay the one-third down and secure the deferred payments of two-thirds of a million was extended to the 10th day of November, then next, with the right to the purchaser to complete the purchase at an earlier date.

Second. The purchasers to pay interest at the rate of 6 per cent. per annum on $999,000 from the 10th day of September to such time as they might elect to purchase, or not to purchase; such interest to be payable every fifteen days while the option continued.

Third. In place of all the other provisions as to the payment and security of the deferred payment of two-thirds of a million, the same

was to be secured by a mortgage on the lands conveyed, and be paid in six annual payments of $100,000 each year until the last payment, which was to be $67,000, and all of which payments were to bear interest at six per cent., payable semi-annually, with a provision that, in case of a default in the payment of any installment of principal or interest at the time it became due, the whole amount then unpaid should at once become due and payable, and the mortgage might be foreclosed.

Fourth. Mrs. Forsyth's right to elect whether she would exercise the right to reserve a portion of the lands from the sale, and substitute others therefor, was extended to the 10th day of October.

Fifth. That it was provided that the notices of election to be made by Ord, to take the land or not to take it, should be served at the office of Messrs. Doolittle & McKey, and notices of Mrs. Forsyth's election to reserve the lands mentioned from the sale and substitute others should be served at the office of Messrs. Mason,
326 & 7 in this city.

The plaintiffs' testimony further tends to show that after the contracts of June 10th and August 4th were signed a question arose as to the difficulty that might still occur in the foreclosure suit, by reason of the provision that the money intended to liquidate the Pierson trust-deed indebtedness would be in New York city in the hands of the Mercantile Trust Company, and the litigation over the amount due would be going on in the courts of Indiana, and that to arrange so as to bridge or avoid this difficulty Mr. Doolittle, Jr., went to New York city, at the request of the defendant, on or about the 14th of September, and was absent until the 27th of September, during which time he negotiated a further supplemental agreement, dated September 28th, and signed by both parties, by which, in the event that this foreclosure suit should be pending at the time the sale should be consummated, the purchaser should intervene in the foreclosure suit and pay into court $210,000, and, if possible, obtain an order of court transferring the lien of the trust deed for the indebtedness to the money so paid into court; and in case the court should require the deposit of a larger sum of money as a condition of discharging the lien and transferring it to the fund in court, then the purchasers should advance the requisite sum within 30 days; in case the purchasers elected not to take under the contract the $10,000 which had been paid on the 10th day of June was to be forfeited without the tender of a deed, so that the Forsythis were released from the obligation to tender a sufficient deed in order to secure and retain the $10,000, and that the payments to be made under the contract might be made in certified checks.

After this agreement of September 28th was made, the complainants in the foreclosure suit dismissed their bill, and on the
328 7th of November a further supplemental contract was made, by which it was agreed that Mrs. Forsyth might file a bill to redeem the property from this Forsyth trust deed, and pay into court $135,000, which was all she admitted to be due, although the face of the indebtedness was $163,000 and accrued interest for over one year; and that Ord or his assigns should intervene in such suit

to redeem and pay into court the further sum of $75,000, and pray by their intervening petition that the lien of the trust deed should be transferred to the funds so paid into court by the two parties, and the money so paid into court to be at the risk of Mrs. Forsyth.

The plaintiffs' testimony further tends to show that the notices by Ord of his election to take the land under the agreement were served on or about November 8th, and that Mrs. Forsyth elected to reserve from the sale the lands mentioned in the contract of June 10th, and to substitute others therefor at the same time, and that on the 10th of November the sale was concluded by the payment of $333,333.33, as called for by the contract, all except the $135,000 and the $75,000 to be paid into court, and the balance of one-third of the purchase-money was paid over to Mrs. Forsyth, except some comparatively small amounts reserved on account of some defects in the title to some small parcels, which were very soon after adjusted satisfactorily, and that on the 11th of November, a bill to redeem was filed in the United States circuit court at Indianapolis, and that the $135,000 was deposited by Mrs. Forsyth, and the $75,000 by the intervening purchasers.

The plaintiffs' proof further tends to show that in and about all the matters leading up to the final conclusion of this important transaction they took an active, laborious, and responsible part; that they participated in the negotiation, and took a leading
329 and responsible part in behalf of the sellers, in suggesting, discussing, and settling the terms of the several contracts. Also that, before these negotiations between the Forsyths and Weston began, Mr. Forsyth had given a power of attorney to one Petherick, and had also written a letter to him, and Mrs. Forsyth had also written a letter which figured in the matter, and that under the pretended authority with which Petherick claimed to be clothed by this power of attorney and these letters he had made or pretended to have made a sale of the entire tract of land to one Tremearne, of London, England, and that very soon after the negotiation between the Forsyths and Ord assumed such character as to indicate a probability, or strong possibility, of a sale to Ord and his associates being accomplished, a suit was commenced in the circuit court of Lake county, Indiana, where the land was situated, for the purpose of enforcing the specific performance of the pretended sale to Tremearne made by Petherick under this power of attorney and letter, and that it became a delicate and difficult task to satisfy the attorneys of Ord and the purchasers in the face of this hostile title asserted by Tremearne; that there was not danger in taking the Forsyths' title, and that the duty of so satisfying the attorneys of Ord was performed by the plaintiffs in such a way as to satisfy Ord's attorneys, who were well-known able lawyers of this city; that they could safely advise their clients to accept the Forsyth title, notwithstanding the pendency of the Tremearne suit; that to perform such duty successfully required the most full and careful examination of the grounds of fact and law upon which the Tremearne suit was predicated, and a presentation of those grounds to the attorneys of

Ord in such a way as that they could see and know that the suit was not well founded.

330 The plaintiffs' proof further tends to show that part of the land in question was bounded by meandered lakes, and the question of the rights of Mrs. Forsyth to the bed and soil of those lakes had to be investigated and discussed in the light of the law and facts by the plaintiffs as attorneys for Mrs. Forsyth and the attorneys for the purchasers, questions being raised by the attorneys of the purchasers as to the ownership of the beds and shores of those lakes as a necessary question in investigating those titles.

The testimony further tends to show that there appeared upon the records of Lake county, Indiana, certain liens to the amount of $13,000 upon the lands in question for the alleged construction of certain ditches under the drainage law of Indiana, and the plaintiffs' proof tends to show that the plaintiffs investigated these liens, and secured an adjustment of them in such a way as to satisfy the purchasers' attorneys; that it involved a discussion of the drainage law and an adjustment with the officers of the county of these liens in such a way as to satisfy the parties who were purchasers.

The proof also tends to show that at about the time the contract with Weston was first made a contract was given to one Horne, by which the defendants agreed to pay Horne a commission of five per cent. on the entire purchase if he would effect a sale to Weston and his associates at a million of dollars; that this contract was reduced to writing and signed by Jacob Forsyth; that at about the time the contract of June 10th was completed, and signed by Mrs. Forsyth alone, the contract with Horne was changed to a contract between Mrs. Forsyth and Horne, still agreeing to pay Horne $50,000, or five per cent., for securing this sale, and in the course of the negotiation the question arose, after the contract of

331 June 10th had been signed, and after the parties had arrived at an agreement as to the contract of August 4th, that the plaintiffs suggested that it was useless and unnecessary to pay this Horne commission, and that accordingly the plaintiffs negotiated with Horne and made such arrangements with him as to compel and induce Horne to reduce the $50,000 contract for commissions of five per cent. down to a one per cent, or $10,000 commission.

In addition to these services, which the plaintiffs claim involved a large amount of labor and a high degree of ability, as lawyers or negotiators, to retain the confidence of the purchasers and their attorneys, not only in the desirability of the purchase, but of the ability of the Forsyths to make a good title notwithstanding the complications and difficulties by which this title was hampered and embarrassed, the plaintiffs have offered proof tending to show that they performed valuable services for the defendants in the several suits to which I have so far only incidentally alluded.

First. In the foreclosure suit brought by Adams, Dearborn, and Churchill, and pending in the United States court in the district of Indiana, to foreclose the Pierson trust deed; that they had prepared a defense in that case, which was usury; that in order to prepare

this defense the facts had to be carefully ascertained and considered as to whether they constituted usury, and formulated into an answer; that also, as this suit was brought in the name of persons not the original parties to the paper secured by the Pierson trust deed, before the defense of usury could be made available to the defendants it must be ascertained whether the parties who brought the suit—that is, Adams, Churchill, and Dearborn—and claimed to be the holders of these notes, were in fact *bona fide* holders, or whether they only held the notes by a merely colorable assignment. If Adams, Churchill, and Dearborn were in fact
332 *bona fide* holders, or purchasers of this paper for value, then the defence of usury could not be set up as against them; but if they were merely colorable holders—if the paper had merely been assigned to them to enable them to bring a suit in their names, without their having paid a consideration—then the defence could be interposed as against them. Under this state of facts the plaintiffs prepared the answers to the bill and looked up the proof tending to show that the complainants in the foreclosure suits were not *bona fide* holders of the paper. I say the proof tends to show this.

The proof further tends to show that this foreclosure suit, after the filing of this answer, was dismissed, and that the defence, of course, which had been set up in this answer could not be made available, that is, could not be brought to a hearing, and thereupon, in order to obtain the benefit of the defence which had been set up in the answer in the original foreclosure case, complainants prepared, at the request of the defendants, a bill to redeem from this trust deed. This was prepared upon the basis that the transaction was usurious, and that the Forsyths could have this trust deed discharged and set aside by the payment of the original amount of money actually borrowed and interest thereon at 6 per cent. per annum; and for all this the claimants claim compensation.

The Tremearne suit was a bill asserting, in substance, that Tremearne had obtained a valid right to purchase the property in question, under the papers given to Petherick, and it was filed in a court of competent jurisdiction, and made charges that required an answer or required to be met by a question of law.

The testimony tends to show that for the purpose of embarrassing, as it is assumed, this sale, and thereby extorting some kind of
333 a compromise, the papers that had been attached as exhibits, and upon which they made the claim to assert the validity of this Tremearne alleged contract, were abstracted from the files, and that an effort had to be made to obtain the return of these papers to the files, all of which, it is claimed, was done by Mr. J. R. Doolittle, Jr., and that at some time during the proceedings the case was removed by the efforts of J. R. Doolittle, Jr., to the United States circuit court for the district of Indiana, and there, after getting a restoration of the files, a demurrer was interposed to the Tremearne bill which involved the question as to whether the Tremearne bill made a case for a specific enforcement of this contract; that this demurrer to the Tremearne bill was argued, after careful preparation,

before the United States circuit court at Indianapolis, in which argument and preparation both the Mr. Doolittles, to some extent, participated. So, also, Petherick and Leigh, who were agents in the Tremearne matter, were made parties to the amended foreclosure bill, and the answer in the foreclosure bill had to meet the allegations as to Petherick's and Leigh's interest in the property.

The testimony further tends to show that in the progress of this negotiation and in the conduct of this sale the Forsyths contemplated the purchase of various outside tracts of land, outside of the 8,000 acres involved in the sale, for the purpose of either selling them to the same parties who had purchased the 8,000 acre tract or holding them for future speculations or developments, and that options were obtained and titles were examined for a large number of tracts of land, all of which were done, and much negotiation in regard to which was had by Mr. J. R. Doolittle, Jr., at the request of Mr. Forsyth, such as the Roberts contract, the Tully contract, the Eggers contract, the Cummings matter, the Cushing contract, &c.

334 The plaintiffs' testimony also tends to show that there was a settlement of various judgments and claims which became necessary, which existed as clouds on the title of the Forsyths to this property.

The plaintiffs' testimony also tends to show that at the time they rendered these services the defendant was unable to pay them; that the defendant promised that if the negotiation with Ord and his associates was successful they should be liberally and generously paid; and for the purpose of showing the reasonable value of the services the plaintiffs have called as witnesses seven gentlemen, who are practicing lawyers in this city, and a Mr. Gulliver, who, while practicing mainly in New York city, has had, as he testified, much experience in regard to the value of such services in other places, including the city of Chicago; and these gentlemen have given you their estimates of the value of the plaintiffs' services, some in the aggregate and others somewhat in detail; and these estimates vary from $40,000 to $65,000 as the total value of the services rendered, according to the tendency of the plaintiffs' testimony.

The defendants, while admitting that the plaintiffs were employed by them to defend the foreclosure and the Tremearne suits and to prepare the bill to redeem, insist—

First. That the plaintiffs were never employed as negotiators in and about the sale of the land in question; that, on the contrary, the negotiations were all, or substantially all, conducted by Mr. Forsyth, and that the plaintiffs simply reduced to writing or put in technical form what Mr. Forsyth and the purchasers agreed to.

Second. That the plaintiffs' employment was only as attor-

335 neys in the conduct of the several suits mentioned in this trial and in the preparation of contracts, the terms of which had been substantially settled between the parties to the contract, and that some consultations were had by the defendants with the

plaintiffs, in which they gave advice and opinions as lawyers only as to the legal effect of the contracts discussed and entered into, and as to some questions as to the titles of the land in question, which arose during the progresss of the negotiations for the sale.

Third. Defendant admits that the plaintiffs rendered some services in the examination of abstracts of title of several of the tracts of land known as the outside or option purchases, the purchase of which was contemplated by Mrs. Forsyth while the sale to Ord was pending.

Fourth. Defendant denies that it was ever agreed or understood that the plaintiffs' compensation should be in any way contingent or dependent on the result of the pending propositions for sale, and denies that there was any agreement or understanding that the plaintiffs should be paid liberally or generously in case the proposed sale was accomplished, and that in case of failure to effect a sale she would be unable to pay a reasonable fee; but the defendant, on the contrary, insists that the extent and amount of the plaintiffs' compensation it was agreed should be left to Mr. Forsyth, and that the plaintiffs have been paid $2,500 for their services, and that said sum is a reasonable compensation for all the services rendered by the plaintiffs to the defendant; but the defendant says, in substance, that if the said sum so paid is not a reasonable compensation, still the amount demanded and insisted upon by the plaintiffs is unreasonable, large, unjust, and exorbitant.

336 In support of the position assumed by the defendant proof has been given by the defendant tending to show that the actual services rendered by the plaintiffs were much less than that claimed by the plaintiffs; that the plaintiffs were only retained to assist McDonald & Butler, eminent lawyers in Indianapolis, in the foreclosure suit, the Tremearne suit, and the bill to redeem from the trust deed; that the real responsibility for the conduct of these cases was with McDonald & Butler, and that plaintiffs were only consulted with and employed as associate counsel because they resided in Chicago, where Mr. Forsyth could more readily or easily and frequently give them information and make suggestions as to the conduct of said cases; that all the material facts upon which the defense in the foreclosure suit rested were collected and furnished to the plaintiffs by Mr. Forsyth himself, with the exception as to the investigation as to the ownership of the notes, which was made by Mr. Seymour, of Connecticut, and who was paid for doing so by the defendants; that the Tremearne suit was never an obstacle to the completion of the sale, and no serious cloud upon the defendant's title; that the bill to redeem was only a restatement of the same matters contained in the answer to the foreclosure suit, and involved no special labor, and required no such professional services from the plaintiffs as entitled them to anything more than a reasonable fee as associate counsel with McDonald & Butler in the institution of that suit, and that the plaintiffs were discharged from the defendant's service very shortly after the bill to redeem was filed, and before the case was finally brought to issue.

The defendants' proof tends to show that the plaintiffs rendered no services as negotiators in regard to the sale of the land; that the terms of the contracts and the special provisions as to the security of the deferred payments, the modifications of the Ord con-
336a tract as prepared in New York, embraced in the contract of June 10th, and the supplemental contract of August 4th were all substantially suggested by Mr. Forsyth; that much of the time spent by Mr. Doolittle, Jr., in discussing the terms of the several contracts was either voluntarily or wholly unnecessary; that the reduction of the Horne commission contract was wholly obtained by the acts of Mr. and Mrs. Forsyth, and that plaintiffs were not instrumental in securing the modification of Horne's contract; that the question of the riparian rights upon the lakes and ponds upon which parts of the lands were situated, and by which they were bounded, had been fully settled by the courts, and cut no figure in the examination of the title; that the ditch liens were no actual but only an apparent lien upon the land, and it required no special professional labor, skill, or address to remove them.

The defendants have also offered proof tending to show that the plaintiffs agree that the amount of their compensation should be fixed by Mr. Forsyth; that they would be satisfied with whatever price he should fix; that Mr. J. R. Doolittle, Jr., said that he was no negotiator, and after much of the labor, for which plaintiffs now claim large compensation, had been performed, Mr. J. R. Doolittle, Jr., asked Mr. Forsyth for a loan of $100, and stated in substance that he had not then earned it.

And the defendants, in support of the position so taken, have introduced proof tending to show that a fair and reasonable compensation to plaintiffs for the services which defendant's proof tends to show were rendered by the plaintiffs, would be from three to ten thousand dollars. I name the lowest and highest amounts mentioned.

Defendant has also given some proof tending to depreciate the value of the plaintiffs' services, by showing that the mortgage to secure the purchase-money of the land is not as broad in its
337 terms of description as the deed; that is, that the mortgage does not cover all that was conveyed by the deed. I see no special pertinency to this point, unless it be to depreciate the quality of the work done by the plaintiffs. It cannot be considered by you as a set off, for there is no proof that the defendant has been, as yet, in any way injured by this oversight or omission, if there be one. The mortgage was to secure this $666,666.67 purchase-money. It does not yet seem to have been foreclosed, and there is no proof that the property described in the mortgage is not worth the debt. The case is one where, if a suit had been brought by the defendant against the plaintiffs for professional neglect in the preparation of this deed and mortgage, the only damages which could be rendered would be merely nominal, because no actual damage is shown to have been sustained.

So, also, there is some criticism upon the failure of the plaintiffs to prepare such an answer in the foreclosure case as would prevent

the complainants in the foreclosure suit from dismissing the bill. As I remember the proof, it tends to show that Mr. J. R. Doolittle, Jr., told Mr. Forsyth that he was of opinion or thought that he had put such allegations or prayer for relief as would prevent the complainant from dismissing the bill, but that on submitting the question to McDonald & Butler they advised Mr. Doolittle, and he so told Mr. Forsyth, that the complainants could dismiss their bill. The only way under the practice in the Federal courts, or perhaps any court of equity, to have prevented a dismissal of this bill at any stage at which it had reached before it was dismissed was to have filed a cross-bill and paid the money into court, which the defendant admitted was due, and which would in effect have been then a bill to redeem. The defendant, as the proof tends to show,
338 had not the money with which to file a cross-bill at any time during the pendency of the original foreclosure bill, and could not, therefore, by any acts of theirs, prevent the dismissal of the foreclosure suit at any stage which it had reached before it was dismissed.

In regard to the position that the plaintiffs agreed that their compensation should be fixed by Mr. Forsyth, I say to you—

First. That plaintiffs have offered testimony tending to show that no such agreement or understanding was ever had between the parties. In other words, they have given testimony tending to deny the defendants' proof in that regard, and you must say whether there was, from all the proof, such an agreement.

Second. That if you believe from the proof that such an understanding was had, it does not allow Mr. Forsyth to arbitrarily fix an inadequate or unreasonably low price, but he would still, as arbitrator, be bound to pay and adjust the compensation of the plaintiffs at a fair and reasonable price for the services rendered.

The rebutting testimony of the plaintiffs also tends to show that the plaintiffs did not attempt to borrow money of Mr. Forsyth at the time stated by the defendant's witnesses, and that plaintiff, J. R. Doolittle, Jr., did not say to defendant that he knew he had not at that time earned the money.

You will see from the statement of the position of the two parties that there is a wide discrepancy, and in many particulars a direct contradiction, between the witnesses for the plaintiffs and the witnesses for the defendants. Where there is a conflict between the testimony of the witnesses, you are to decide as to the credibility of the witnesses and say which you will believe. And in this case it is quite palpable that the result of the case depends almost wholly upon whether you accept the statements of the witnesses who
339 have testified for the plaintiffs or of those who have testified for the defendants. You should, if possible, attempt to reconcile this testimony by assuming that neither party had committed perjury, sworn falsely, wilfully, and intentionally; but if you cannot do so, then you will decide which one has falsely stated the testimony to you.

As to the nature and extent of the services rendered by the plaintiffs you are to say, from the proof, when all taken and considered

together, whether the plaintiffs were employed by the defendants to act in the capacity of negotiators as well as attorneys, and if you are satisfied, from the proof, that they were so employed, and did so act as negotiators, then they are entitled to compensation for their services as negotiators. Although the plaintiffs are lawyers by profession that does not prevent them from acting as negotiators, if so employed by a client. The function or duty of a negotiator is not necessarily and alone that of a mere broker to bring buyer and seller together; but, especially in large transactions in regard to real estate and other large interests, it may require the exercise of a very high order of talent to properly present the advantages of a purchase, and arrange terms of payment, so as to meet the views of both seller and buyer. Your own common knowledge of business affairs has undoubtedly taught you that if one man owns a large tract of real estate, and is willing to sell it at a given price, there may yet remain much to be done, especially if part of the purchase-money is to be paid at a future date, in settling the terms of the security and making all needful provision as to future contingencies in the event of non-payment, which will, as far as skill and ability can do, prevent entangling complications and loss in the future, and that often much more than mere technical skill in drawing contracts is required in settling what shall be expressed or stated in those contracts.

340 You will also readily see, from the nature of the property which was the subject-matter of the sale, the uncertainty which existed almost up to the last day that the option contract remained in force, as to whether Mr. Ord and his associates would take the property; that there was a necessity for the exercise by some one, on the part of the Forsyths, of very great sagacity, foresight, and shrewdness to prevent the title to the property from being so clouded by this transaction as to seriously impair its selling value to others in case this proposed sale should fail. The question of fact in this case is: Who did the negotiating and settling of the terms of these several contracts, changing their terms from time to time to meet contingencies? Did the main burden of that duty fall upon, and was it performed by, the plaintiffs, as their proof tends to show, or was it mainly and substantially done by Mr. Forsyth, as the defendants' proof tends to show? Then, in regard to the apparent cloud thrown upon the title by the commencement of this Tremearne suit, just at the time the buyers' attorney was examining the title, you can readily understand that while any good lawyer, who was fully advised as to the facts upon which that suit depended, might be of opinion that Tremearne would fail to sustain his case when brought to hearing, yet it may have been a very difficult and delicate piece of work to so present that case to the attorney of the purchasers as to quiet all fears, and so far assure him that the defense must be successful as to induce him to advise the purchasers to accept the title in the face of the pending Tremearne suit.

And you are to say, in the light of the proof, whether there was at any time any danger that the sale would be defeated from this cause, and whether the plaintiffs rendered any and what services in

the matter of piloting the defendant, so to speak, over this
341 dangerous crisis, if there was such a crisis, in the pending sale.

In regard to the modification of the contract with Horne, there is no dispute that Horne's contract was changed so that the commission or compensation for the sale was reduced from 5 per cent to 1 per cent., or from $50,000 to $10,000, and the plaintiffs claim this was suggested and accomplished by their skill in dealing with Horne, while the defendant insists that the reduction of Horne's pay was wholly and solely obtained by the action of Mr. and Mrs. Forsyth. The question for you to settle under the proof is, What, if any, effective service did the plaintiffs perform in securing this reduction of the Horne contract and how much compensation should the plaintiffs have for the services rendered in this matter?

So in regard to the question as to the Forsyth title to the water rights upon the meandered lakes and ponds on which some of the parcels of land making up this large tract were situated, and in regard to the ditch liens which appear upon the record against the land. Were these or either of them obstacles to the acceptance of defendant's title, which, if not fully and satisfactorily explained, or as to the ditch liens removed, imperiled the sale, and does the proof show that the plaintiffs rendered efficient and valuable services in satisfying Mr. Mason, the buyers' attorney, that these constituted no valid objection to the defendant's title? If the proof does so satisfy you, then the plaintiffs are entitled to a fair and reasonable compensation for such services.

And in regard to all the services claimed to have been rendered by plaintiffs the extent and quality of these services, as well as their value, are to be determined by you in the light of the proof which has been submitted to you in this case.

342 As to the value of the services, the plaintiffs are entitled to a fair and reasonable compensation for the services which the proof shows to your satisfaction they have performed, and what is a fair and reasonable compensation you are to determine from the proofs to which you have listened.

In determining the value of these services you may and should take into consideration, in the light of the proof, the nature of these services, the amount involved in the transaction, the difficulty of the legal questions to be met and overcome, the danger of the proposed sale being broken up or defeated by the difficulty in settling the terms of the contracts, or by the interposition of some or many of the objections raised to the defendant's title. You should also consider, in the light of the proof, how far the ability and skill of the plaintiffs as negotiators or attorneys, or in both capacities, was effective in securing the successful outcome of the pending negotiations. You may properly take into consideration the fact that from the inception of this negotiation up to about the 8th of November Ord and his associates had not committed themselves to the purchase, and that they could have retired from the field with only a loss by forfeiture of the comparitively small sum which had up to that time been paid; that is, the $10,000 paid on the 10th of June and the interest; and you may, from your own knowledge of affairs,

assume that to have secured the final consummation of such a contract, which held both parties in suspense and uncertainty during about six months, and which was at any time liable to be broken up and defeated, required a high order of negotiating ability. Whether the requisite ability which secured this successful result is to be credited to the plaintiffs or whether it was all furnished by Mr. Forsyth and on his side is the important question of fact which you must determine from the evidence in the case. But all these are
343 matters to be considered by you in coming to the amount to be awarded the plaintiffs for their services. You can readily understand that the value of professional work of this character depends to some extent upon the value and importance of the subject-matter upon which the work is bestowed. The more important the work, the more money involved in a business transaction, the more careful, exact, and vigilant would a client expect his attorney to be upon whose advice or direction he relied in the transaction; so that while the magnitude of the transaction is not alone the controlling element by which the plaintiffs' compensation is to be fixed, yet it is right and proper that you should consider it; so also, if the compensation of the plaintiffs was by express agreement to be liberal or generous in case the sale should be completed, while, if the sale failed, it would manifestly leave defendant in such pecuniary condition that she could pay little or nothing or make the compensation of the plaintiffs precarious and uncertain, that is a fact which you are to consider with the other facts in the case, assuming, of course, that the proof satisfies you that the compensation was to be made generous in case the sale went through.

Lawyers engaged in the practice of their profession, seven in this city and one elsewhere, have been called by the plaintiffs as witnesses, as I have already stated, and to these witnesses five hypothetical questions have been put, and upon the statements made in these questions as to the nature and amount of the services assumed to have been shown by the proof to have been rendered by the plaintiffs for the defendants these witnesses have given their estimate of what would be a fair and reasonable compensation for these services, while the defendants have also called eight lawyers, well-known gentlemen of the bar of this city and engaged in their prac-
344 tice here, and have propounded to them a hypothetical question embodying a statement of what services the defendant claims the proof shows the plaintiffs performed for the defendants, and these witnesses upon the statement of the nature and extent of the services so rendered have given you their estimates of what would be a fair and reasonable compensation for the plaintiffs' services as stated in the defendant's hypothetical question.

As to the questions you must understand that they—that is, the questions—are not evidence; they are mere statements to these witnesses, called by the respective parties, of what the party putting these questions claims the proof shows was the nature and amount of plaintiffs' services rendered, and upon the hypothesis or assumption of these questions the witnesses are asked to give their estimate of the value of these services. You must readily see that the value

of the answers to these questions depends largely, if not wholly, upon the fact of whether the statements made in these questions are sustained by the proof. If the statements in these questions are not supported by the proof then the answers to the questions are entitled to no weight, because based upon false assumptions or statements of facts; so that to estimate the value of the testimony of these expert witnesses you are first to determine whether any or all of these questions, and which of them, makes a correct statement of the fact established by the proof.

The questions, especially those on the part of the plaintiffs, are very long and elaborate, and open to serious objections for that reason; but in the haste of the trial it was impossible for the court to reconstruct or abride them, and I therefore allowed them to be answered, stating to you at the time you were not to consider these questions as arguments or as facts in the case, but only as the
345 assumption of the party propounding them that the proof justified and sustained the position that the facts stated in these questions were established by the proof. And I now repeat that caution, so that you need not be misled by these questions, or give them a weight to which they are entitled. They are simply questions to the witnesses containing a statement of the party putting them of what he claims the proof establishes, and the testimony of the witnesses is based upon them.

If the proof satisfies you that the plaintiffs performed for the defendants these services stated in plaintiffs' five hypothetical questions, then you may properly consider the answers made to these questions by the witnesses called in behalf of the plaintiffs as to the value of the services.

In regard to the matter stated in these questions I will further say: Some of the witnesses called by both parties to prove the value of the services stated in the questions have given separate estimates of the value of certain specific services, such, for illustration, as plaintiffs' services in the foreclosure suit and in the Tremearne case and bill to redeem. Now, if you should find from the proof that the statements in these hypothetical questions, as to the entire services rendered, are not supported by the proof, but that the statements in these questions as to certain special or particular services are sustained by the proof, then the testimony of those witnesses who have given their estimates in detail or by items may properly be considered as to such items of service in the questions as are supported by the proof; that is to say, where a witness has given you an estimate of the value of all the services in a round sum or lump, the whole statement must be supported by the proof in order to give any value to his testimony; but where the witness has itemized the services, and any of these items are proven, then it is proper to con-
346 sider his testimony as to such items, although all the statements contained in the question may be sustained by the proof. So far as the hypothetical question states the proven facts in regard to any item or part of the plaintiffs' services and the witnesses for either party have placed an estimate upon the value of such services, you may consider the testimony of such witnesses, although

all the statements in the question or questions are not sustained by the proof. And the same may be said in regard to the defendants' hypothetical question. If its statements as to the extent and nature of the plaintiffs' services rendered to the defendant are fully supported by the proof, or, in other words, if the proof satisfies you that the plaintiff performed for the defendant the services stated in the defendant's question, and only those services, then you may properly consider the answers of the witnesses who were called by the defendant as to the value of those services; but if the statements of the defendant's hypothetical question are not supported by the proof, then no weight should be given to the estimate of the defendant's witnesses, except, as I have already said, when the witnesses have itemized and testified upon the same items as the plaintiffs' witnesses, and the items are supported by the proof.

It is proper, however, that I should in this connection call your attention to the fact that one of the plaintiffs' witnesses, as to value, Mr. Hervey, testified that he had heard the testimony of Mr. J. R. Doolittle, Jr., and given his estimate as to what was a fair and reasonable charge for the services rendered from Mr. Doolittle's statement as to the nature and extent of such services, so that Mr. Hervey's estimate of the value of the services is based on the assumption that Mr. J. R. Doolittle, Jr., truly stated in his testimony
347 the nature and amount of the services by the plaintiffs for the defendant. Mr. Hervey does not testify to you that the plaintiffs, in fact, render the services claimed, but only if it be true, as stated by Mr. Doolittle, Jr., in his testimony that plaintiffs did render these services, then a reasonable value or compensation for them would be the amount stated by him.

You are not bound by the estimate which these witnesses have put upon these services. They are proper to be considered by you as part of the proof bearing upon the question of value, as the tesmony of men experienced in such matters and whose judgment may aid yours. But it is your duty, after all, to settle and determine this question of value from all the testimony in the case, and to award to the plaintiffs such amount, by your verdict, as the proof satisfies you is a reasonable compensation for the services which, from the proof, you find plaintiff rendered, after deducting the amount the plaintiffs have already received for such services.

Of course, if the proof satisfies you that the plaintiffs have already been fully paid, your finding will be for the defendant, because nothing is due, and no verdict can be rendered for the plaintiffs; but, if not, then you will state in your verdict the amount yet due to the plaintiffs.

As you have listened to this charge you must have already seen that this case presents almost no questions of law. What few questions of law do arise I have already stated to you. The case must, in the main, be solved by you upon the questions of fact involved in the proof. If, by a preponderance in the evidence, you find that plaintiffs have rendered to the defendants services to the extent and of the kind claimed by them, and which their proof tends to sustain, then the plaintiffs will be entitled to recover a fair and

348 reasonable compensation for such services, and you must fix that compensation from the proof in the case. If, on the contrary, you find from the proof that the plaintiffs' services to the defendants were of the limited nature and extent which defendants' testimony tends to show, then you should fix the value of those services at a fair and reasonable amount, as shown by the proof. You have not, from the nature of this case, any such standard of value for these services as you would have in a suit to recover for goods sold which have a fixed standard market value, which can be readily ascertained by reference to the market reports, nor, perhaps, as you would have if this was a suit for the wages of a laborer, where the labor market for that kind of service was well established; but you must, in the light of all the evidence, approximate as nearly as you can to what is just and reasonable for the services which you find to have been rendered. You are, as nearly as possible, with the proof before you, to arrive at what is a reasonable amount to which the plaintiffs are entitled. You are not to go into the realm of conjecture and guess as to what is a fair and reasonable compensation for these services, but are to fix the amount in the light of the proof.

From what I have said you will see that in the important question in this case—that is, the value of the plaintiffs' services—the court can render you almost no aid whatever, for the amount of compensation is wholly a question of fact, to be settled by you from the proof. The most and only thing I can do is, as I have done, to briefly recapitulate the positions of the respective parties, and to direct your attention to some of the important features of the testimony bearing upon the nature of the plaintiffs' services and the right to payment therefor.

The testimony in the case is voluminous, and it has taken
349 a long time to place it before you and properly discuss it, but, after all, so far as your duty is concerned, it is only to be considered by you so far as it tends to aid you in the solution of two questions:

First. What services did the plaintiffs render the defendants? And in this connection perhaps I ought to call your attention to the statement made several times in the course of the trial, that Mrs. Forsyth, the only defendant before the court, is liable for any services rendered in this matter which have been detailed in the testimony, whether they were rendered directly to Mrs. Forsyth or to Jacob Forsyth, Clark Forsyth, or Oliver Forsyth.

Second. What is the fair and reasonable value of these services, and how much, if anything, is yet due the plaintiffs therefor?

The form of your verdict, gentlemen, will be, "We, the jury, find the issues for the plaintiff, or the defendant." As I have stated, if you find nothing due, you will find the issues for the defendant. If you find anything due, then you will simply say, "We, the jury, find the issues for the plaintiff," and fix the damages at so much, which will be the amount which you find to be due.

350 Counsel for defendant duly excepted to each and every of

the following portions of the charge of the court to the jury, to wit:

"That the proof in the case tends to show, and is not contradicted in this particular, that the land in question lies in the northwest corner of the State of Indiana, upon the southern margin of Lake Michigan, is intersected by several small lakes or bayous, and consists mainly of low sand ridges and grassy swales; that only a small fraction of it is fit for agricultural purposes; that its chief element of value is its adaptability, by reason of its close proximity to the city of Chicago, to improvement by the construction of a harbor, docks, and other facilities for various uses, such as lumber yards, manufactories, slaughtering and packing houses, &c., as a business suburb of the city of Chicago."

* * * * * * *

"That the proof on the part of the plaintiffs tends to show that the plaintiffs were consulted as to the terms of the option contract, as it is called, of May 11th, and that they rendered valuable services in framing this contract and suggesting its terms."

* * * * * * *

"Plaintiffs proof further tends to show that on the receipt of the Ord contract plaintiffs were consulted by Mr. Forsyth, as the representative of Mrs. Forsyth, and the plaintiffs advised that it should not be signed, and that material and important modifications
351 were, at the suggestion of Mr. J. R. Doolittle, Jr., who was chiefly consulted, made in the contract before they would advise Mrs. Forsyth to sign it."

* * * * * * *

"That the plaintiffs contend that the changes made in the original Ord contract were not acceptable to Ord and his associates; that the contract of June 10th, signed by Mrs. Forsyth, differing so materially from that signed by Ord that there was really then, after the signing of the contract of June 10th by Mrs. Forsyth, no contract between them, and that the Forsyths were liable to refund to Ord and his associates the $10,000 which had been paid over by Weston on the signing by Mrs. Forsyth of the June 10th contract; that, growing out of this complication, there was a long and protracted negotiation, in which Ord and his counsel, Mr. A. B. Mason, and subsequently Mr. Simpson and Senator Barnum, of Connecticut, participated on the part of the purchasers, and in which the interests of the Forsyths were represented by the plaintiffs, principallp by Mr. J. R. Doolittle, Jr., and that finally the minds of the parties as to the various terms of this option contract of purchase, and the manner in which the notice of election on the part of the purchasers to take or not to take the property and consummate the transaction, were finally settled on or about the 4th of August, 1881, at which time Ord signed the contract of June 10th, and both parties signed the contract of August 4th, which was supplemental to the contract of June 10th."

* * * * * * *

"The plaintiffs' proof further tends to show that in and
352 about all the matters leading up to the final conclusion of this important transaction they took an active, laborious, and responsible part, and that they participated in the negotiation and took a leading and responsible part in behalf of the sellers in suggesting, discussing, and settling the terms of the several contracts."

* * * * * * *

"That a suit was commenced in the circuit court of Lake county, Indiana, where the land was situated, for the purpose of enforcing the specific performance of a pretended sale by Tremearne made to Petherick under this power of attorney and letter, and that it became a delicate and difficult task to satisfy the attorneys of Ord and the purchasers, in the face of this hostile title by Tremearne, that there was not danger in taking Forsyth's title."

* * * * * * *

"In addition to these services, which the plaintiffs claim involved a large amount of labor and a high degree of ability as lawyers or negotiators to retain the confidence of the purchasers and their attorneys, not only in the desirability of the purchase, but of the ability of the Forsyths to make a good title, notwithstanding the complications and difficulties by which this title was hampered and embarrassed, the plaintiffs have offered proof tending to show that they performed valuable services for the defendant in the several suits to which I have, so far, only incidentally alluded."

* * * * * * *

353 "Plaintiffs' testimony also tends to show that at the time they rendered these services the defendant was unable to pay them; that the defendant promised that if the negotiations with Ord and his associates was successful they should be liberally and generously paid."

* * * * * * *

"In regard to the position that plaintiffs agreed that their compensation should be fixed by Mr. Forsyth, I say to you—

"First. That plaintiffs have offered testimony tending to show that no such agreement or understanding was ever had between the parties. In other words, they have given testimony tending to deny the defendants' proof in that regard, and you must say whether there was, from all the proof, such an agreement.

"Second. That if you believe from the proof that such an understanding was had, it does not allow Mr. Forsyth to arbitrarily fix an inadequate or unreasonably low price, but he would still as arbitrator be bound to pay and adjust the compensation of the plaintiffs at a fair and reasonable price for the services rendered."

* * * * * * *

"In this case it is quite palpable that the result of the case depends almost wholly upon whether you accept the statements of the witnesses who have testified for the plaintiffs, or those who have testified for the defendants."

* * * * * * *

"You can readily understand that any good lawyer who was fully advised as to the facts upon which that depended might
354 be of opinion that Tremearne would fail to sustain his case when brought to hearing, yet it may have been a very difficult and delicate piece of work to so present that case to the attorney of the purchasers as to quiet all fears, and so far assure him that the defense must be successful as to induce him to advise the purchaser to accept the title in the face of the pending Tremearne suit. And you are to say, in the light of the proof, whether there was at any time any danger that the sale would be defeated from this cause, and whether the plaintiffs rendered any and what services in the matter of piloting the defendant, so to speak, over this dangerous crisis, if there was such a crisis, in the pending sale."

* * * * * * *

"So also, if the compensation of the plaintiffs was, by express agreement, to be liberal and generous in case a sale should be completed, while if the sale failed it would manifestly leave the defendant in such a pecuniary condition that she could pay little or nothing, or make the compensation of the plaintiffs precarious and uncertain; that is a fact which you are to consider with the other facts in the case, assuming of course that the proof satisfies you that the compensation was to be made generous in case a sale went through."

* * * * * * *

"If the proof satisfies you that the plaintiffs performed for the defendant these services stated in plaintiffs' five hypothetical questions, then you may properly consider the answers made to these questions, by the witnesses called in behalf of the plaintiffs, as to the value of the services."

* * * * * * *

355 "As to the nature and extent of the services rendered by the plaintiffs you are to say from the proof, when all taken and considered together, whether the plaintiffs were employed by the defendants to act in the capacity of negotiators as well as attorneys, and if you are satisfied, from the proof, that they were so employed and did so act as negotiators, then they are entitled to compensation for their services as negotiators. Although the plaintiffs are lawyers by profession, that does not prevent them from acting as negotiators if so employed by a client. The function or duty of a negotiator is not necessarily and alone that of a mere broker, to bring buyer and seller together; but, especially in large transactions in regard to real estate and other large interests, it may require the exercise of a very high order of talent to properly present the advantages of a purchase and arrange terms of payment so as to meet the views of both buyer and seller. Your own common knowledge of business affairs has undoubtedly taught you that if one man owns a large tract of real estate and is willing to sell it at a given price, there may yet remain much to be done, especially if part of the purchase-money is to be paid at a future date, in settling the terms of the

security and making all needful provision as to future contingencies in the event of non-payment, which will, as far as skill and ability can do, prevent entangling complications and loss in the future, and that often much more than mere technical skill in drawing contracts is required in settling what shall be expressed or stated in those contracts.

"You will also readily see, from the nature of the property which was the subject-matter of the sale, the uncertainty which existed almost up to the last day that the option contract remained in force as to whether Mr. Ord and his associates would take the prop-
356 erty, that there was a necessity for the exercise, by some one on the part of the Forsyths, of very great sagacity, foresight, and shrewdness to prevent the title to the property from being so clouded by this transaction as to seriously impair its selling value to others in case this proposed sale should fail."

* * * * * * *

"You may properly take into consideration the fact that, from the inception of this negotiation up to about the eighth of November, Ord and his associates had not committed themselves to the purchase, and that they could have retired from the field with only a loss, by forfeiture, of the comparatively small sum which had up to that time been paid; that is, the $10,000 paid on the 10th of June and the interest; and you may, from your own knowledge of affairs, assume that to have secured the final consummation of such a contract, which held both parties in suspense and uncertainty during about six months, and which was at any time liable to be broken up and defeated, required a high order of negotiating ability."

* * * * * * *

The counsel for the defendant requested the court to charge the jury that the option contract of June 10th, 1881, was binding on Caroline M. Forsyth and Jacob Forsyth, and could have been enforced against them, although Ord may not have signed the same nor any duplicate thereof; which said request the court denied and refused to charge the jury as so requested; to which ruling of the court counsel for defendant duly excepted.

357 Thereupon the jury retired, and, after consideration, returned into court the following verdict:

We, the jury, find the issue for the plaintiff, and assess the damages at forty thousand dollars.

358 Whereupon the defendant, by her counsel, moved to set aside said verdict and for a new trial, and filed the following reasons therefor as follows:

And now comes the said defendant, Caroline M. Forsyth, by William H. King and Frederick W. Packard, her attorneys and counsel, and moves for a new trial in the above-entitled cause, and, in writing, hereby particularly specifies the grounds of such motion as follows, to wit:

First. The court erred in admitting on the trial, against the objection of defendant's counsel, incompetent, irrelevant, and immaterial evidence and testimony on behalf of said plaintiffs, which

said evidence and testimony unduly magnified the difficulty, importance, and value of the plaintiffs' services and had a direct tendency to and manifestly did unduly impress and influence the jury in favor of the plaintiffs and against said defendant.

Second. The court erred in excluding on the trial competent, material, and pertinent evidence and testimony offered on behalf of said defendant.

Third. The court erred in refusing to charge or instruct the jury in accordance with the requests of counsel for said defendant, and which requests were proper and legal, and the defendant was entitled to have the jury charged and instructed in accordance with said requests.

Fourth. The court, in the charge to the jury, gave particular prominence to the evidence for the plaintiffs, and what such evidence tended to prove, and did not give equal prominence to many salient features of the defendant's evidence, and did not fully and sufficiently explain the bearing and significance and tendency
359 of portions of the evidence in the case particularly favorable to the defendant, and the charge of the court, taken as a whole, had an unquestionable tendency to impress upon the jury a view of the case especially favorable to the plaintiffs, and the jury were greatly influenced by the charge of the court in favor of the plaintiffs, and for that reason ignored to a large extent in arriving at their verdict the points in the evidence weighing in favor of the defendant and the true bearing and significance of such evidence. The charge erroneously instructed the jury what the plaintiffs' evidence tended to prove. The charge was in many other respects erroneous.

Fifth. The court erred in allowing any of the so-called hypothetical questions to be read by the jury and propounded to the expert witnesses called and examined on behalf of the plaintiffs, in manner and form as the same was done on the trial, said so-called hypothetical questions, and each and every thereof, being incompetent and erroneous in form and substance, containing, as they do, absolute statements and assertions of facts and numerous conclusions drawn from such asserted facts, and thus calculated to fully possess and saturate the minds of the jury with the plaintiffs' side of the case, and not leave the minds of the jury open to an unbiased consideration of all the facts in the case as shown by the testimony.

Sixth. The verdict of the jury is not warranted or sustained by the evidence.

Seventh. The verdict of the jury is contrary to the law and the evidence in the case.

Eighth. The damages awarded by the verdict of the jury
360 are grossly excessive, exorbitant, and unjust.

Ninth. The jury was manifestly unduly prejudiced against the defendant.

Tenth. Melville W. Fuller, the leading counsel for the plaintiffs on the trial of this case, was a jury commissioner to select jurors for this court, and who selected one-half of the jurors whose names were placed in the box from which the jurors before whom this case was

tried were drawn, and a portion of the jurors before whom this case was tried were so selected by said Fuller. And neither the said defendant nor her counsel knew that said Fuller was such jury commissioner, or selected any jurors for this court, until more than a week after the rendition of the verdict in this case.

Eleventh. For divers and sundry errors appearing in the record and proceedings the verdict of the jury should be set aside and a new trial granted.

WILLIAM H. KING,
FREDERICK W. PACKARD,
Attorneys and Counsel for said Defendant.

361 Whereupon the court overruled and denied said motion for a new trial. To the overruling and denial of which said motion counsel for defendant then and there duly excepted.

And thereupon the defendant moved the court for an arrest of judgment, which motion was overruled by the court. To the ruling of which said motion in arrest counsel for defendant then and there duly excepted.

One of the points urged by the defendant for a new trial was that Mr. M. W. Fuller, who was one of the plaintiffs' attorneys on the trial of said cause, had acted as jury commissioner of said court in the selection of the jurors from whom the panel of jurors who tried said cause had been empanelled.

And it appearing to the court that said Fuller, in connection with the clerk of said court, had, on the fourth day of January, 1883, drawn from a box containing over three hundred names of persons qualified to serve as jurors of said court thirty-six names; and that the persons whose names were so drawn by said Fuller and the clerk were summoned to appear and serve as jurors for the law term, commencing on the seventeenth day of said month of January; and that the panel of jurors who tried this case was selected from said list of jurors so drawn; and that said Fuller had acted as such jury commissioner of the court for over two years; and that no objection to the jury array, nor to any individual member thereof, was taken by defendant at the time the jury was empanelled to try this case, and that such objection was made for the first time on said motion for new trial, the court deemed said objection as not made in apt time.

362 The court thereupon rendered judgment upon said verdict in favor of said plaintiffs and against said defendant. To the rendition of which said judgment defendant then and there duly excepted.

Now, inasmuch as the matters aforesaid do not appear of record, the defendant, by her counsel, presents this her bill of exceptions and prays that the same may be signed and sealed by the court and made a part of the record in this case, which is done accordingly.

H. W. BLODGETT, *Judge.* [SEAL.]

Endorsed: Filed June 25, 1883. Wm. H. Bradley, clerk.

363 Afterwards, to wit, on the nineteenth day of July, in the July term of said court, A. D. 1883, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

JAMES R. DOOLITTLE *et al. vs.* CAROLINE M. FORSYTH *et al.*

Assumpsit.

Now come the parties, by their attorneys, and on motion of the defendants' attorney to fix the amount of the supersedeas bond herein, orders that the bond, if to act as a supersedeas, be in the sum of fifty-five thousand dollars, and, if not to act as a supersedeas, in the sum of one thousand dollars, and that the same be filed within sixty days of the entry of the judgment herein.

364 Afterwards, to wit, on the fourteenth day of August, A. D. 1883, there was filed in said clerk's office an appeal bond in said entitled cause, which said appeal bond is in the words and figures following, to wit:

Appeal Bond.

Know all men by these presents that we, Caroline M. Forsyth, of Sheffield, in the county of Lake, in the State of Indiana, as principal, and Jacob Forsyth, Robert Clark Forsyth, and Oliver O. Forsyth, of the same place, as sureties, are held and firmly bound unto James R. Doolittle, James R. Doolittle, Jr., and Henry McKey, of Chicago in the county of Cook, in the State of Illinois, their heirs, executors, administrators, and assigns, in the sum of one thousand dollars, lawful money of the United States of America; for the payment of which, well and truly to be made to the said James R. Doolittle, James R. Doolittle, Jr., and Henry McKey, their heirs, executors, administrators, or assigns, we bind ourselves, our heirs, executors, and administrators, jointly, severally, and firmly by these presents.

Witness our hands and seals this thirteenth day of August, A. D. 1883.

The condition of the above obligation is such that whereas the said James R. Doolittle, James R. Doolittle, Jr., and Henry
365 McKey did, on the twenty-fifth day of June, A. D. 1883, in the circuit court of the United States for the northern district of Illinois, and of the adjourned May term thereof, A. D. 1883, recover a judgment against the above-bounden Caroline M. Forsyth for the sum of forty thousand dollars, besides cost of suit; and whereas the above-bounden Caroline M. Forsyth has prosecuted a writ of error from the Supreme Court of the United States to said circuit court of the United States to re-examine and reverse the above-mentioned judgment rendered by the said circuit court of the United States:

Now, therefore, if the said Caroline M. Forsyth shall duly prosecute her said writ of error to effect and shall answer all costs if she

shall fail to make her plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

CAROLINE M. FORSYTH. [SEAL.]
JACOB FORSYTH. [SEAL.]
ROBERT C. FORSYTH. [SEAL.]
OLIVER O. FORSYTH. [SEAL.]

(Endorsed:) Approved August 14, 1883. Thomas Drummond. Filed August 14, 1883. Wm. H. Bradley, clerk.

366 Afterwards, to wit, on the twenty-ninth day of August, A. D. 1883, there was filed in said clerk's office a supersedeas bond in said entitled cause, which said bond is in the words and figures following, to wit:

Supersedeas Bond.

Know all men by these presents that we, Caroline M. Forsyth, of Sheffield, in the county of Lake, in the State of Indiana, as principal, and Jacob Forsyth, Robert Clark Forsyth, and Oliver O. Forsyth, of the same place, and Marcus M. Towle, of Hammond, in said county of Lake and State of Indiana, as sureties, are held and firmly bound unto James R. Doolittle, James R. Doolittle, Jr., and Henry McKey, of Chicago, in the county of Cook, in the State of Illinois, their heirs, executors, administrators, and assigns, in the penal sum of fifty-five thousand dollars, lawful money of the United States of America, for the payment of which, well and truly to be made to the said James R. Doolittle, James R. Doolittle, Jr., and Henry McKey, their heirs, executors, administrators, or assigns, we bind ourselves, our heirs, executors, and administrators, jointly, severally, and firmly, by these presents.

Witness our hands and seals, this twenty-second day of August, A. D. 1883.

The condition of the above obligation is such that whereas the said James R. Doolittle, James R. Doolittle, Jr., and Henry McKey did, on the twenty-fifth day of June, A. D. 1883, in the circuit court of the United States for the northern district of Illinois, and of the adjourned May term thereof, A. D. 1883, recover a judgment
367 against the above-bounden Caroline M. Forsyth for the sum of forty thousand dollars, besides costs of suit; and whereas the above-bounden Caroline M. Forsyth has prosecuted a writ of error from the Supreme Court of the United States to said circuit court of the United States to re-examine and reverse the above-mentioned judgment rendered by said circuit court of the United States: Now, therefore, if the said Caroline M. Forsyth shall duly prosecute her said writ of error to effect and shall answer all damages and costs if she shall fail to make her said plea good, then the above obligation to be void; otherwise, to remain in full force and virtue.

CAROLINE M. FORSYTH. [SEAL.]
JACOB FORSYTH. [SEAL.]
ROBERT C. FORSYTH. [SEAL.]
OLIVER O. FORSYTH. [SEAL.]
MARCUS M. TOWLE. [SEAL.]

(Endorsed:) Approved Aug. 29, 1883, as a supersedeas bond. Thomas Drummond. Filed Aug. 29, 1883. W. H. Bradley, clerk.

368 On the same day, to wit, on the twenty-ninth day of August, in the July term of said court, 1883, in the record of the proceedings thereof in said entitled cause, before Hon. Thomas Drummond, circuit judge, is the following entry, to wit:

Order.

JAMES R. DOOLITTLE, JAMES R. DOOLITTLE, Jr., and HENRY MCKEY
vs.
CAROLINE M. FORSYTH, Impleaded with JACOB FORSYTH.

Assumpsit.

The above-named defendant, Caroline M. Forsyth, having within the time prescribed by law filed her supersedeas bond in this case in the sum of fifty-five thousand dollars, with good and sufficient surety, duly approved by this court, it is hereby ordered by the court that the said bond shall be, operate, and act as a supersedeas in this case; and it is further ordered by the court that all process and proceedings on the judgment rendered in this case shall be stayed.

369 Afterwards, to wit, on the second day of October, A. D. 1883, there was filed in said clerk's office a stipulation in said entitled cause, which said stipulation is in the words and figures following, to wit:

Stipulation.

In the Circuit Court of the United States for the Northern District of Illinois.

JAMES R. DOOLITTLE, JAMES R. DOOLITTLE, Jr., and HENRY MCKEY
vs.
CAROLINE M. FORSYTH.

It is hereby stipulated that the original declaration filed in said cause need not be incorporated in the record of said cause for the Supreme Court, but that the amended declaration only need be shown in the record.

October 2, 1883.

KING & PACKARD,
Attorneys for said Defendant.
DOOLITTLE & MCKEY,
Attorneys Pro Se.

Endorsed: Filed Oct. 2, 1883. Wm. H. Bradley, clerk.

370 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify that the

foregoing is a true and correct transcript of the record of all the proceedings had in said court in the cause wherein James R. Doolittle *et al.* are the plaintiffs and Caroline M. Forsyth, impleaded, &c., is the defendant, as the same appear from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district, this fifth day of October, A. D. 1883.

[Seal of Circuit Court U. S., Northern Dist. Illinois. 1855.]

WM. H. BRADLEY, *Clerk.*

371 *Error.*

In the Supreme Court of the United States.

CAROLINE M. FORSYTH
vs.
JAMES R. DOOLITTLE, JAMES R. DOOLITTLE, Jr., and HENRY MCKEY.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Henry S. Stoddard, of Chicago, in said northern district of Illinois, being duly sworn, doth depose and say that he, this affiant, is, and was on the 14th day of July, A. D. 1883, assistant clerk in the office of the clerk of the circuit court of the United States for the said northern district of Illinois, and that on the 14th day of July, A. D. 1883, he, this affiant, at the request of counsel for the above-named Caroline M. Forsyth, served the annexed writ of error by lodging a true copy thereof for the above-named James R. Doolittle, James R. Doolittle, Jr., and Henry McKey in the clerk's office of the circuit court of the United States for the northern district of Illinois, where the record in the above-entitled cause then remained and still remains.

HENRY S. STODDARD.

Subscribed and sworn to before me this 28th day of September, A. D. 1883.

[Notarial Seal, Frederick A. Root, Cook County, Ill.]

F. A. ROOT,
Notary Public, Cook Co., Ills.

372 UNITED STATES OF AMERICA, } *ss:*
Northern District of Illinois, }

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, Greeting:

Because in the record and proceedings as also in the rendition of a judgment in a plea which is before you in said circuit court, between James R. Doolittle, James R. Doolittle, Jr., and Henry McKey, plaintiffs, and Caroline M. Forsyth, impleaded with Jacob Forsyth, defendant, in an action of assumpsit, a manifest error hath happened, to the great damage of the said Caroline M. Forsyth, impleaded as aforesaid, as by her complaint appears, and it being fit that the error,

if any there has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby command, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1883, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and customs of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this fourteenth day of July, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States the 108th year.

[Seal of Circuit Court U. S., Northern Dist. Illinois. 1855.]

M. H. BRADLEY,
Clerk U. S. Circuit Court Nor. Dist. Ill.

[Endorsed:] Supreme Court of the United States. Caroline M. Forsyth, impleaded with Jacob Forsyth, plaintiff in error, *vs.* James R. Doolittle, James R. Doolittle, Jr., and Henry McKey, defendants in error. Writ of error.

373 *Error.*

In the Supreme Court of the United States.

CAROLINE M. FORSYTH
vs.
JAMES R. DOOLITTLE, JAMES R. DOOLITTLE, JR., and HENRY MCKEY.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Charles Weston, of Chicago, in said northern district of Illinois, being duly sworn, doth depose and say that he, this affiant, did, on the 14th day of August, A. D. 1883, personally serve, at Chicago aforesaid, the annexed citation upon James R. Doolittle and Henry McKey, two of the defendants named in the annexed citation, by personally delivering a true copy of the said citation to each of them, the said James R. Doolittle and Henry McKey, personally, and leaving such copy with each of them, and at the same time showing to each of them the original citation hereto annexed. And that on the 15th day of August, A. D. 1883, he, the said Charles Weston, did, at Chicago aforesaid, personally serve the annexed citation upon James R. Doolittle, Jr., one of the defendants
373*a* named in the annexed citation, by personally delivering a true copy of the said citation to the said James R. Doolittle, Jr., and leaving such copy with him, the said James R. Doolittle, Jr., and at the same time showing to him the original citation hereto annexed. This affiant further says that he is a practicing lawyer and a clerk in the law office of William H. King, one of the attor-

neys and of counsel for plaintiff in error, and that this affiant made the service aforesaid upon the defendants in error aforesaid at the request of the said King.

CHARLES WESTON.

Subscribed and sworn to before me this 16th day of August, A. D. 1883.

[Seal Philip A. Hoyne, U. S. Commissioner, N. D. Ill., Chicago.]

PHILIP A. HOYNE,
U. S. Commissioner, North'n Dist., Ill.

[Endorsed:] Supreme Court of the United States. Caroline M. Forsyth *vs.* James R. Doolittle, James R. Doolittle, Jr., and Henry McKey. Affidavit of service of citation.

374 UNITED STATES OF AMERICA, *Northern District of Illinois,* } *ss:*

To James R. Doolittle, James R. Doolittle, Jr., and Henry McKey, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the second Monday of October, A. D. 1882, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein Caroline M. Forsyth is the plaintiff in error and James R. Doolittle, James R. Doolittle, Jr., and Henry McKey are the defendants, to show cause, if any there be, why the judgment and record of this court mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Thomas Drummond, circuit judge, this 14th day of August, in the year of our Lord one thousand eight hundred and eighty-three.

THOMAS DRUMMOND.

[Endorsed:] Supreme Court of the United States. Caroline M. Forsyth, plaintiff in error, *vs.* James R. Doolittle, James R. Doolittle, Jr., and Henry McKey, defendants in error. Citation to October term, A. D. 1883.

375 *Assignment of Errors.*

In the Supreme Court of the United States, of the October Term, A. D. 1883.

Error to the Circuit Court of the United States for the Northern District of Illinois.

CAROLINE M. FORSYTH, Plaintiff in Error,
vs.
JAMES R. DOOLITTLE, JAMES R. DOOLITTLE, JR., and HENRY MCKEY, Defendants in Error.

And now comes the said Caroline M. Forsyth, the said plaintiff

in error and the defendant in the said circuit court, by William H. King and Frederick W. Packard, her attorneys, and says that in the record and proceedings aforesaid, and in rendering and entering the judgment aforesaid, there is manifest error, in this, to wit:

First. The said circuit court erred in admitting, on the trial of the case, immaterial, irrelevant, improper, and incompetent testimony and evidence on the part of the plaintiffs in said circuit court.

Second. The said circuit court erred in refusing to admit, on the trial of the case, material, relevant, proper, and competent testimony and evidence on the part of and offered by the defendant in said circuit court.

376 . The said circuit court erred in admitting, permitting, and allowing the so-called hypothetical question and questions and statements therein contained to be read, stated, and propounded by and on the part of the plaintiffs in said circuit court in manner and form and substance as the same were read, stated, and propounded.

Fourth. The said circuit court erred in overruling and not sustaining the objections of the defendant in said circuit court to the so-called hypothetical questions and statements read, stated, and propounded by the plaintiffs in said circuit court.

Fifth. The said circuit court erred in permitting the witnesses to answer the so-called hypothetical questions and statements read, stated, and propounded to said witnesses by the plaintiffs in said circuit court.

Sixth. The said circuit court erred in overruling and not sustaining the objections of the defendant in said circuit court to the several answers of the witnesses to the so-called hypothetical questions and statements read, stated, and propounded to said witnesses by the plaintiffs in said circuit court.

Seventh. The said circuit court erred in the charge and instructions given by the said circuit court to the jury.

Eighth. The said circuit court erred in refusing to charge
377 the jury in accordance with the request of counsel for the defendant in said circuit court.

Ninth. The said circuit court erred in stating on the trial and in presence of the jury that the counsel for the defendant in said circuit court objects to every question.

Tenth. The said circuit court erred in its several rulings and decisions made in favor of the plaintiffs in said circuit court.

Eleventh. The said circuit court erred in not setting aside the verdict of the jury when it appeared to said circuit court that Mr. Melville W. Fuller, one of the counsel for the plaintiffs in said circuit court, acted as jury commissioner in the selection of the jurors from whom the panel of jurors who tried said case had been empanelled.

By reason whereof, and the errors aforesaid, and other errors

appearing in the record, the said Caroline M. Forsyth, the said plaintiff in error, prays that the said judgment of the said circuit court be reversed, &c.

WILLIAM H. KING,
FREDERICK W. PACKARD,
Attorneys for said Plaintiff in Error,
the said Caroline M. Forsyth.

Endorsed on cover: N. Illinois C. C. U. S. No. 361. Caroline M. Forsyth, impleaded with Jacob Forsyth, plaintiff in error, *vs.* James R. Doolittle, James R. Doolittle, Jr., & Henry McKey. Filed 8th October, 1883.

120-73

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 107.

JAMES R. DOOLITTLE, JAMES R. DOOLITTLE, JR., AND HENRY MCKEY, *Defendants in Error*,

ads.

CAROLINE M. FORSYTH, IMPLEADED WITH JACOB FORSYTH, *Plaintiff in Error*,

LIST OF POINTS ARGUED ORALLY. WITH REFERENCES TO BRIEFS OF PLAINTIFF IN ERROR AND DEFENDANTS IN ERROR.

First Point.—That Jacob Forsyth was incompetent to make admissions binding on his co-defendant, Caroline M. Forsyth.

Discussed, Plaintiff's Brief, pp. 7, 8, 9, 10, 11.

Discussed, Defendant's Brief, pp. 11, 12, 13, 14.

Second Point.—That the general character and adaptabilities of the 8,000 acre tract could not be shown.

Discussed, Plaintiff's Brief, p. 6.

Discussed, Defendant's Brief, p. 11, as A. J. Averill's testimony.

Third Point.—The hypothetical questions.

Discussed, Plaintiff's Brief, pp. 26, 27, 28, 29, 30.

Discussed, Deft's Brief, pp. 31, 32, 33, 34, 35, 36, 37, 38, 39, also 48, 49, 50.

Fourth Point.—That the reasons given by two experts, W. C. Gulliver and Leonard Swett, in support of their opinions, expressed a wrong view of the measure of damages in the case; and it was error to allow the reasons to go to the jury.

Discussed, in Plaintiff's brief;

as to *Gulliver's* testimony, pp. 12, 13, 14.

as to *Swett's* testimony, pp. 15, 16, 17, 18, 19, 20.

In Defendant's brief,

as to *Gulliver's* testimony, 15, 16, 17, 18, 19.

as to *Swett's* testimony, 19, 20, 21, 22.

Fifth Point.—That where testimony is contradicted, an expert who has heard the testimony of a witness for either party, may not give his opinion upon the hypothesis of the truth of the testimony so heard; that the facts must be stated in a different form as an hypothetical question.

Discussed in Pl'ff's Brief, as Hervey's testimony, pp. 20, 21, 22, 23.

Discussed in Def'ts Brief, pp. 23, 24, 25, 26, 27.

12078

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1886.

CAROLINE M. FORSYTH, IMPLEADED WITH JACOB FORSYTH, *Plaintiff in Error*, *vs.* JAMES R. DOOLITTLE, JAMES R. DOOLITTLE, JR., AND HENRY MCKEY.	No. 107.

BRIEF IN BEHALF OF PLAINTIFF IN ERROR.

By McDONALD, BUTLER & MASON.

FRANK H. SMITH, PRINT., INDIANAPOLIS

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1886.

CAROLINE M. FORSYTH, IMPLEADED WITH JACOB FORSYTH, *Plaintiff in Error*,
vs.
JAMES R. DOOLITTLE, JAMES R. DOOLITTLE, JR., AND HENRY MCKEY.
No. 107.

BRIEF IN BEHALF OF PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

The defendants in error are practicing attorneys in the city of Chicago, State of Illinois. James R. Doolittle is a citizen and resident of the State of Wisconsin, and James R. Doolittle, Junior, and Henry McKey are citizens of the State of Illinois. Caroline M. Forsyth and Jacob Forsyth, her husband, are citizens of the State of Indiana.

The suit was brought to recover for the value of the services of the defendants in error as attorneys at law,

rendered or alleged to have been rendered to the said Caroline M. Forsyth in and about the defense of certain suits affecting her separate property and in and about negotiations for the sale of that property, which services are alleged to have been rendered between the first day of April, 1881, and the 10th day of November in the same year.

The amended declaration on pages 4 to 15 of the record, sets out the nature and character of the services so claimed to have been rendered, which is accompanied by a bill of particulars, found in the record on pages from 15 to 17 inclusive.

No judgment was sought against Jacob Forsyth and Caroline M. Forsyth, in answer to the amended declaration, filed her plea of general issue, which is found on pages 3 and 4 of the record.

The cause was tried by a jury and a verdict rendered in favor of the defendants in error in the sum of $40,000.

Motions for a new trial and motions in arrest of judgment were made in their order and overruled by the Court and judgment entered for the amount of the verdict—page 24 of the record.

Numerous objections were made during the progress of the trial by the counsel for the plaintiffs in error, to the admissibility of the testimony offered by the defendants in error, and were overruled by the Court and exceptions taken. These exceptions are embraced in the bill of exceptions filed in the cause, which bill of exceptions is found in the record, extending from page 25 to 215.

The errors assigned in motion for new trial and which are assigned as errors in this Court, as far as the same may be applicable, are as follows:

ASSIGNMENT OF ERRORS.

First. The Court erred in admitting on the trial, against the objection of defendants' counsel, incompetent, irrelevant, and immaterial evidence and testimony on behalf of said plaintiffs, which said evidence and testimony unduly magnified the difficulty, importance, and value of the plaintiff's services and had a direct tendency to and manifestly did unduly impress and influence the jury in favor of the plaintiffs and against said defendant.

Second. The Court erred in excluding on the trial competent, material, and pertinent evidence and testimony offered on behalf of said defendant.

Third. The Court erred in refusing to charge or instruct the jury in accordance with the requests of counsel for said defendant, and which requests were proper and legal, and the defendant was entitled to have the jury charged and instructed in accordance with said requests.

Fourth. The Court, in the charge to the jury, gave particular prominence to the evidence for the plaintiffs, and what such evidence tended to prove, and did not give equal prominence to many salient features of the defendant's evidence, and did not fully and sufficiently explain the bearing and significance and tendency of portions of the evidence in the case particularly favorable to the defendant, and the charge of the Court, taken as a whole, had an unquestionable tendency to impress upon

the jury a view of the case especially favorable to the plaintiffs, and the jury were greatly influenced by the charge of the Court in favor of the plaintiffs, and for that reason ignored to a large extent in arriving at their verdict the points in the evidence weighing in favor of the defendant and the true bearing and significance of such evidence. The charge erroneously instructed the jury what the plaintiffs' evidence tended to prove. The charge was in many other respects erroneous.

Fifth. The Court erred in allowing any of the so-called hypothetical questions to be read by the jury and propounded to the expert witnesses called and examined on behalf of the plaintiffs, in manner and form as the same was done on the trial, said so-called hypothetical questions, and each and every thereof, being incompetent and erroneous in form and substance, containing, as they do, absolute statements and assertions of facts and numerous conclusions drawn from such asserted facts, and thus calculated to fully possess and saturate the minds of the jury with the plaintiff's side of the case, and not leave the minds of the jury open to an unbiased consideration of all the facts in the case as shown by the testimony.

Sixth. The verdict of the jury is not warranted or sustained by the evidence.

Seventh. The verdict of the jury is contrary to the law and the evidence in the case.

Eighth. The damages awarded by the verdict of the jury are grossly excessive, exorbitant, and unjust.

Ninth. The jury was, manifestly, unduly prejudiced against the defendant.

Tenth. Melville W. Fuller, the leading counsel for the plaintiffs on the trial of this case, was a jury commissioner to select jurors for this Court, and who selected one-half of the jurors whose names were placed in the box from which the jurors before whom this case was tried were drawn, and a portion of the jurors before whom this case was tried were so selected by said Fuller. And neither the said defendant nor her counsel knew that said Fuller was such jury commissioner, or selected any jurors for this Court, until more than a week after the rendition of the verdict in this case.

Eleventh. For divers and sundry errors appearing in the record and proceedings the verdict of the jury should be set aside and a new trial granted.

ARGUMENT.

The points to which we wish to call the attention of the Court especially are, first, the incompetent, irrelevant and immaterial evidence and testimony admitted in behalf of the defendants in error by the Court over objection by the plaintiffs in error, and, second, the errors arising upon the rulings of the Court in admitting so-called hypothetical questions to be read to witnesses or expert witnesses in the presence of the jury, and the testimony given by so-called expert witnesses in response to said so-called hypothetical questions, and third, the instructions of the Court to the jury which were excepted to by defendant.

In considering these questions, we desire the Court to bear in mind that this action was brought for services performed professionally and otherwise on what is termed a *quantum meruit;* that these services are

claimed in the declaration to have been rendered from the first day of April, 1881, to the tenth of November, in the same year, and are shown by the record to have been, so far as the defendants in error are concerned, rendered exclusively by one member of said firm, namely, by James R. Doolittle, Junior.

The testimony specially objected to and admitted over objections, is found in the record from page 25 to 34 inclusive.

The first of this to which we desire to call the attention of the Court is found in the testimony of A. J. Averill, on page 26, which is as follows:

"Engaged in the real estate business, in the city of Chicago, twenty-two years; have examined the Forsyth tract of land; is composed largely of swales and sand ridges; not to exceed 1,000 acres in the 8,000 acre tract could be cultivated; nearest point about sixteen miles from court house in Chicago; by expenditure of a good deal of money it might be suitable for manufacturing purposes; harbor would have to be opened into Wolf Lake from Lake Michigan; should think it purely speculative property, its chief value being for development by construction of harbor facilities for transaction of commercial business; is not suitable for farming, but its proximity to Chicago makes it possible; in future developments about the city it might be available for manufacturing and other purposes as a suburb of Chicago."

We are unable to see upon what principle this testimony is admissable and how it in any manner tends to illustrate the character or quality of the services rendered by defendants in error.

Among the first witnesses called was Joseph B. Chandler, who testified (see printed record, p. 27,) "that in November, 1881, *after consummation of sale*, he met Mr. Forsyth and Mr. Doolittle, Jr., and congratulated Forsyth upon his successful negotiation of his property, *and that Forsyth, with a waive of his hand and a very graceful bow, turned to Mr. Doolittle and remarked that witness should congratulate Mr. Doolittle.*"

On the same page of the record is found the testimony of Isaac N. Hardin, in which he relates a conversation between himself and Mr. Forsyth, relative to Mr. Weston, and details the apprehensions that Forsyth entertained that Weston would not carry out the arrangements with reference to the purchase of the property.

Witness also testifies "*that after the sale took place* Forsyth said to witness, *it had been his very great good fortune in securing Judge Doolittle and his son as his counsel; that, giving character to the transaction had aided largely the result of the sale.*"

When it is taken into consideration that Mr. Forsyth was not the owner of the property, was not the party sued for services and had no relation to the suit except as he was the husband of the plaintiff in error, Caroline M. Forsyth, and so far as he may have acted, could only have acted as her agent, this testimony would seem to stand upon no foundation whatever as evidence against the plaintiff in error, for if they were the declarations of an agent, it does not appear that they were declarations made in connection with any act done by him as agent so as to be classed as part of the

res gestae, and have not the remotest reference to the employment or services of the defendants in error.

When it is remembered that the two great controversies in this case were: (1) Whether or not the Doolittle firm had been employed to act in the capacity of negotiators at all, in addition to their employment as attorneys, and (2) What was the value of their services, it is manifest that this admission is evidence of the declarations of Jacob Forsyth made, as each witness testifies expressly, *after the consummation of the sale*, could not help but have had great weight with the jury upon both of the questions in controversy.

The authorities are uniform to the effect that the declaration of an agent, in order to bind the principal, must be made not only during the *continuance of the agency*, but in regard to a transaction pending at the very time and constituting a part of the *res gestae*.

Anderson v. *Rome, &c., R. R. Co.*, 54 N. Y., 334, on p. 341.

Furst v. *Second Avenue R. R. Co.*, 72 N. Y., 542, on p. 545.

The case of *Livesley* v. *Lasallette*, 28 Wis. 38, on page 41, is particularly instructive, inasmuch as in that case the Court below admitted the statement of the husband made after the transaction as evidence against the wife, the husband having been the agent of the wife in the transaction. The Court say:

"It is well settled that the declarations of the agent, to bind or be admissable against the principal, must be made at the time of the act or transaction by the agent, and constitute a part of the *res gestae*; or, if not so made,

that they must be authorized by the principal. *Mil. and Miss. R. R. Co.* v. *Finney* 10 Wis., 391. The defendant *Peter Lasallette* was acting as the agent of his wife, the defendant Christiana, in the affair of the alleged purchase of the hops in payment of the note and mortgage. His declarations or statements at that time as to the hops being received in payment were admissible against the defendant *Mrs. Lasallette*, but not his declarations or statements made afterwards, unless it was shown that *Mrs. Lasallette* authorized them. The Court below rules, however, as appears from the record, that his declarations subsequently made to the witness Harris were admissible, and might be read as evidence against her, although it was not shown that she either knew of or assented to such declarations. To this objection, exceptions were taken by counsel in her behalf. We think the ruling and decision of the Court clearly erroneous. The power and capacity of a husband when acting as the agent of his wife are no greater than if he were acting as the agent of any other person. It will not do to say, because he is her husband, that he is authorized to admit away the legal rights of his wife in a business or transaction where he once acted as her agent. The rule in such cases must be that which governs in all others, and the declarations of the husband here ought not to have been received as evidence against the wife, but only against himself."

In the case of *Packet Co.* v. *Clough*, 20 Wall. 528, on page 540, this Court has made a decided expression of opinion upon the point in question. In that case Mrs. Clough, a passenger on a steamer, was injured.

Two days after the accident, but before the voyage of the steamer was completed, the Captain of the steamer made certain statements respecting the cause of the accident, which the Court admitted in evidence as against the Packet Company. The Supreme Court say:

"In this we think there was error. Declarations of an agent are, doubtless, in some cases, admissible against his principal, but only so far as he had authority to make them, and authority to make them is not necessarily to be inferred from power given to do certain acts. A captain of a passenger steamer is empowered to receive passengers on board, but it is not necessary to this power that he be authorized to admit that either his principal, or any servant of his principal, has been guilty of negligence in receiving passengers. There is no necessary connection between the admission and the act. * * * * * * It is true that whatever the agent does in the lawful prosecution of the business intrusted to him, is the act of the principal, and the rule is well stated by Mr. Justice Story, that 'where the acts of the agent will bind the principal, there his representations, declarations, and admissions respecting the subject-matter will also bind him, *if made at the same time, and constituting part of the res gestae.*' A close attention to this rule, which is of universal acceptance, will solve almost every difficulty. But an act done by an agent cannot be varied, qualified, or explained, either by his declarations, which amount to no more than a mere narrative of a past occurrence, or by an isolated conversation held, or an isolated act done at a later period. The reason is that the agent to do

the act is not authorized to narrate what he had done or how he had done it, and his declaration is no part of the '*res gestae.*'

"Applying this rule to the present case, how does it stand? The thing of which the plaintiffs complain was negligence, on the 30th of September, a fault in providing for Mrs. Clough's embarkation on the steamer. That, and that alone, caused the injury she sustained. That and nothing else was the '*res gestae.*' What the captain of the boat said of the transaction two days afterwards was, therefore, but a narrative of a past occurrence, and for that reason, it could not affect his principals. *It had no tendency to determine the nature, quality, or character of the act done or left undone, and it is not, therefore, within the rule stated by Judge Story.*"

Applying the rule of these cases to the case at bar, it is evident that the declarations of Jacob Forsyth in question should not have been admitted in evidence as against his wife, because his authority as agent to make the negotiation for her did not imply or embrace an authority to make declarations, nor to admit away her legal rights, and because the declarations of Forsyth were made *after the sale was consummated, and therefore constituted merely a narrative by him of a past act or occurrence, and did not constitute a part of the* RES GESTAE.

In the disposition of Joseph P. Ord, from page 27 to 30, this witness is permitted to give his opinion of the manner in which James R. Doolittle, Junior, bore himself in such connection, and that it was such, in the opinion of this witness, that it did not occur to him to make any attempt to bargain for the property—to cut

down the price. In fact his testimony in the case indicates that he was overreached by Doolittle, and when asked the question answered by saying: "As to the quality of his services, they were of a very high order, in my judgment, of ability; unusually so."

Testimony equally objectionable was found in the deposition of John W. Simpson, pages 30 to 33. In fact it is very difficult to classify this evidence. In some aspects it would appear to be given as the testimony of an expert upon questions where expert testimony would scarcely under any circumstances be admissible, and again this seems to be more particularly its characteristic, viz, made up of matters of opinion, conjecture and judgment, designed as far as possible to take the questions from the jury and dispose of them by the opinion and statement of witnesses.

The testimony of William D. Gulliver, found on pages 33 to 36, is peculiarly of this character. The particular part of this testimony which we desire to call the attention of the Court as specially objectionable, is as follows:

The counsel for plaintiff propounded to the witness a printed hypothetical statement and question, being statement No. 1 referred to in the testimony of Leonard Swett, on page 36 of the record and extending to page 79 The witness having testified that he had read said question when asked to answer the same. To this counsel for plaintiffs in error objected. Their objection was overruled, and witness answered as follows:

"That the strictly legal services indicated in the question, viz; interpretation of the various contracts,

drawing of the contracts, and advice as to their legal effect, was worth $5,000; that as witness understood the facts set forth in the question, plaintiff's services were, to a large extent, extra-professional, that of negotiators, by which the defendants seem to have been saved a considerable sum of money; and for these services, as distinguished from the strictly legal services, I should regard a proper compensation about $40,000."

Witness was asked by plaintiff's counsel the following question:

"Has your experience in the matter of the negotiation of contracts involving amounts of a quarter of a million dollars and upwards been such that you can state an opinion in regard to the value of services in the matter of negotiating contracts of that character?"

This also was objected to and objection overruled and witness answered "Yes." The objection to the hypothetical questions submitted will be discussed more at length hereafter.

The particular objection to the answer which we now ask the Court to consider, is that it puts the value of the extra-professional services of the defendants in error chiefly upon the results claimed for the plaintiffs in error, and not for the actual work and labor performed, or skill, professional or otherwise, displayed by the defendants in error in the performance of the service.

In *Robbins* v. *Harvey*, 5 Conn. 335, being an action of assumpsit on a *quantum meruit*, for services rendered as attorney, Chief Justice Hosmer says:

"The value of the services is entirely detached from the consideration of their ultimate benefit to the person

rendering them. The value is the benefit of the debtor, and the compensation is the benefit of the creditor; and the questions respecting these subjects is necessarily as separate and disjoined, as is the person of him who does, from him who receives. The inquiry under a *quantum meruit* is not what benefits, immediate or remote, have been derived from the services. If it were, the preserving of a man's life by stopping a horse in full career, on request, might require, as a compensation, a splendid fortune."

The language of the witness in this case is, as quoted before, the "*services were, to a large extent, extra-professional, that of negotiators, by which the defendants seem to have been saved a considerable sum of money.*" What conclusions would the jury be necessarily required to draw from such testimony as that? That the amount which the plaintiffs in error had saved in negotiations and not the services of the negotiator or attorney was to measure the compensation of the negotiator or attorney for rendering the services. They had stopped the horse in full career, on request of the plaintiffs in error, and thereby saved them their lives, and it was the value of the life and not the value of the services that must be paid for.

We do not dwell on these parts of the bill of exceptions for the reason that the objections which follow cover, to some extent, the questions involved here and are of so much more importance and so far-reaching as to dispense with the necessity of much comment at this point. Those questions arise upon the submission of the hypothetical case divided into five several

PHILADELPHIA BAR ASSOCIATION

distinct branches, and numbered one, two, three, four and five, respectively, and they are embraced in the bill of exceptions in connection with the testimony of Leonard Swett, who seems to have been the first witness called upon that special branch of the case. This hypothetical statement is found in the record, beginning at page 36 and extending to page 183, and from the bill of exceptions, appears to have been read *in extenso* before the jury, and upon concluding the reading, the following question was submitted to the witness:

"Upon the foregoing statement of facts, assumed hypothetically to be true, what, in your opinion, would be a reasonable, usual and customary fee for the services of the plaintiff in respect to the drawing of said mortgage?"

This question was objected to, and the objection is set out at length on page 183. The Court thereupon, in the presence of the jury, gave his decision substantially as follows:

"The jury will be told, in the charge of the Court, that they are to take the facts as proven by the witnesses, and not as stated in the hypothetical questions. And, therefore, I do not think that any injury can accrue to the defendant from the elaborate statements of fact in the hypothetical questions, or the manner of the counsel in reading them. They are merely a method of telling the witness what the plaintiffs claim to have done, and then asking the witness' opinion of the value of the services so claimed to have been done. But the jury will be told, in the charge of the Court, that they must ascertain what the plaintiffs have done, and ascertain it

from the evidence, and not from the statements in these hypothetical questions, or in the arguments of counsel."

The witness answered:

"I have heard, perhaps, three-quarters of hypothetical question No. 1 read; have skimmed over the balance at my office; have heard read hypothetical questions 2, 3, 4 and 5. I have not divided the services; have lumped all the services embraced in the five statements or questions."

The Court then proceeds to say:

"The witness having read the first statement and listened to the reading of the others can, if he chooses, give his opinion as to the value of all the services, without dividing it."

The witness then proceeds to give his testimony and instead of basing his testimony upon the hypothetical statements or any of them, proceeds to frame one of his own and which he assumes to be true:

"That Mrs. Forsyth was the owner of about 8,000 acres of land southeast of the city, upon which there was a mortgage of $163,000, with interest added, and other claims added, which was in process of foreclosure when these plaintiffs were retained, and one of their duties was to defend and stave off and get time on the mortgage until something could be done with the land.

I assume also that Mr. Forsyth—the title of the land being in Mrs. Forsyth—had executed a power of attorney to some man in England to sell this land, and Mrs. Forsyth had written a letter saying, in substance, that she stood up to her husband, and a pretended sale had been made under that power of attorney, which was

brought in as a cloud on this title. I assume also that the parties in interest had made a contract with some gentlemen to sell this land, and were to give him $50,000 commissions out of the proceeds of the sale, and, as they went along in the negotiation, the services of that man proved to be useless, and yet he was in a condition that he might get the money; that under the circumstances the plaintiffs here defended the suit on the mortgage, staved it off, getting time while they could negotiate a sale of the land; that there was some complication in regard to the sale of the land at first by the contract, but the end of it was that with the cloud made by the Englishman standing over it, and the mortgage existing and not disposed of, they succeeded in making negotiations for a sale of this land, by which the plaintiffs got $333,333 and a mortgage on the land for all the balance of *his* money, and that out of this enough was taken to put in Court, so that they could file a cross-bill, or bill to redeem, and reduce this mortgage down to its legal amount, and that these parties succeeded in fighting off the Englishman, broke him down, and they, by negotiations, succeeded in reducing the amount of the claim for $50,000 for selling the land, to $10,000, and that under these circumstances they perfected this sale for a million dollars for the land, and got actually in cash $333,333, and got a mortgage for the balance of it—a mortgage on the land for all the balance—making a million dollars altogether.

Now, I would rather not say what I think that service is worth, but I say I think it is worth at least

$50,000. And the reason I say it is this: I believe about fees, generally, they ought to be regulated by contract; and as I have heard this, I have thought over in my mind, situated as Mr. and Mrs. Forsyth at the time were supposing these plaintiffs had said to them: "I will stave off this mortgage until I can effect a sale for a million dollars. I will get $333,333 in money, and security upon the lands for the back payments. I will break down this Englishman. I will reduce the $50,000 down to $10,000." I assume that if that was said to Forsyth that he would have said: "If you will do that I will give you much more than $50,000." I believe if these parties had said this, and then have said to Mrs. Forsyth: "What will you give me for it?" that she would have fixed a price very much larger than $50,000."

As the witness knew nothing about the facts involved in the contention between the parties to the suit, his testimony was sought of course, as that of an expert, and whether it is based upon the hypothetical case or upon the statement of facts as made by himself, it was equally objectionable.

The opinion of witnesses of peculiar skill is admissible, whenever the subject matter of the inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance; in other words, when it so far partakes of the nature of a science as to require a course of previous habit or study in order to the attainment of a knowledge of it. Best on Evidence, 649.

Where the subject of the proposed inquiry is not a matter of science, but of common observation on which

the ordinary mind is capable of forming a judgment, experts cannot state conclusions.

Milwaukee, etc., v. *Kellogg*, 94 U. S. 469.

It has been held that in determining the amount of compensation to be paid to an attorney for legal services, if not fixed by contract, an attorney conversant with the general character of the business and the rates of charges for like services may give his opinion, but the tendency of the decisions is to restrict rather than enlarge the sphere of what is termed expert testimony.

But the special objection to the testimony of this witness is that it is very clear that in fixing the amount of compensation the chief element in his mind was the benefits that were alleged to have accrued to the plaintiffs in error resulting from the services of the defendants in error, and not the value of those services. For instance, he says:

I would rather not say what I think that service is worth, but I say I think it is worth, at least, $50,000. And the reason I say it is this: I believe about fees, generally, they ought to be regulated by contract; and as I have heard this, I have thought over in my mind, situated as Mr. and Mrs. Forsyth at the time were, supposing these plaintiffs had said to them; "I will stave off this mortgage until I can effect a sale for a million dollars. I will get $333,333 in money, and security upon the lands for the back payments. I will break down this Englishman. I will reduce the $50,000 down to $10,000." I assume that if that was said to Forsyth that he would have said: "If you will do that I will give you much more than $50,000." I believe if these

parties had said this, and then had said to Mrs. Forsyth: "What will you give me for it?" that she would have fixed a price very much larger than $50,000."

But the testimony of the next witness is still more objectionable. Robert Hervey testified that he had practiced law 40 years; in Chicago 30 years; had been present during most of the trial. "I have read or heard read the five hypothetical questions in this case. I have heard all the testimony of James R. Doolittle, Jr., in regard to the services rendered. I am acquainted with the usual and customary fees for services of the character described in the testimony and in the hypothetical questions." And after this statement was asked this question: "What, in your judgment, were the services rendered reasonably worth?" This was objected to by counsel and objection overruled, and witness then proceeded:

"I should say that the services which I have heard detailed by Mr. Doolittle, Jr., on the witness stand, in conducting the negotiations culminating in this large sale to Mr. Ord, meeting objections which Mr. Doolittle had to meet, overcoming them, details of which I have heard *in extenso*, which, to my mind, were of a very formidable character as affecting his client—I allude particularly to one service of Mr. Doolittle, in eliminating from the contracts as proposed by Mr. Ord, that Mrs. Forsyth should take payment of the large amount of the deferred payments, two thirds of a million of dollars in bonds of a company to be formed, at par, without any limitation as to the amount of the bonds to be issued by

that company, the value of which would, of course, depend upon the amount of the bonds to be issued, and although secured upon the land, if issued in any very large volume, would be, in my opinion, of comparatively small value—might be, according to the amount issued, from ten to fifty cents on the dollar—Mrs. Forsyth being obliged by that contract to take it, whatever amount was issued, at par, securing the elimination from the contract as proposed by Ord, of the right, in case of failure, to pay the two-thirds of a million by reconveying an undivided two-thirds interest in the lands which I should have considered of a disastrous tendency towards Mrs. Forsyth; the securing payment of $10,000 interest for the extension of sixty days, an extension which I gather from the testimony, Mr. and Mrs. Forsyth would have been very glad to have granted on any terms, inasmuch as there seems to me to have been an absolute necessity on their part that this contract should have been carried out in view of the complications attending the title, viz; this foreclosure proceeding for a very large amount, and this attack upon the title by these London parties: in reducing the Horne contract, which was an absolute engagement, I understand, on the part of Mrs. Forsyth to pay Horne $50,000 for certain services which he agreed to render, or was to render, reducing that from $50,000 to $10,000; in obtaining Mr. Doolittle's construction of the proper amount to be paid as interest on the first payments maturing, as I remember, on the first day of January, 1882, if I mistake not, of some $3,200 more than Mr. Mason's theory claimed would be due, I should say for these services, including the defence of

the Tremearne suit and the ultimate disposition of the Tremearne suit, that five per cent on the full amount of the purchase money would, in my opinion, be not an unreasonable compensation."

It will be seen from the statement of this witness, namely, that he had heard the testimony of James R. Doolittle, Jr., in regard to the services, and that he had heard read the five hypothetical questions in the case, and that he was acquainted with the usual and customary fees for services of that character described in the testimony and in the hypothetical questions, that he was, in his own judgment, fully and amply prepared to take the place of the jury and fix the compensation that ought to be allowed. In the testimony that he gives *in extenso*, to use his own term, it is very clear that the opinion that he finally forms rests mainly upon the testimony delivered by Mr. James R. Doolittle, Jr., in behalf of himself and his co-parties. It is certainly not possible to determine how much of that evidence is influenced by the hypothetical cases, or how much is affected and controlled by the testimony of Doolittle to which he refers with such approval.

It is well established rule relative to this class of testimony that the opinion of a witness cannot be given upon the evidence adduced before the jury, unless that testimony is uncontroverted: but if the facts are doubtful and remain to be found by the jury, it has been held improper to ask an expert who has heard the evidence, what is his opinion upon the case on the trial. 1 Greenleaf on Evidence, Section 440.

This doctrine has been illustrated by many important and well considered decisions in various courts.

In *Craig* v. *N. and S. C. Gravel Road Co.*, 98 Ind., p. 109, the following is stated as the true rule upon this question:

"To allow an expert witness to give his opinion upon the general facts stated by another witness or witnesses without the jury being informed in any way as to what facts testified to controlled the opinion, certainly would take from the jury one of the means of judging as to the correctness of the opinion. The opinion of an expert as to the cause of death, upon facts proved by others, can only be taken upon a hypothetical case stated to the witness, and not upon his own construction and recollection of the evidence given."

The case of *Burns* v. *Barenfield*, 84 Ind., 43, is to the same effect.

In *Reynolds* v. *Robinson*, 64 N. Y., 589, the same rule is laid down, that a witness cannot give opinion from testimony—his opinion should have been obtained by stating a hypothetical case.

Erastus Williams testifies to having heard read the five hypothetical questions in the case, and being asked to state his opinion upon those questions, placed the compensation at $50,000.

This witness does not appear to have heard the testimony of Mr. Doolittle.

The compensation, as in the case of the other witnesses, seems to have been, in his judgment, governed by the benefits which he assumes the plaintiffs in error derived from the services of the defendants in error.

The next witness, James Goggin, qualified himself to testify as an expert by stating that he had read the

hypothetical question No. 1 and had heard all the others read, except No. 5, about the drawing of the mortgage; had heard that testified to by Mr. Doolittle on the stand, and was acquainted with the usual and customary charges for services of the kind named in the hypothetical questions.

The character of his opinions and the basis upon which he formed them are clearly shown from his own statement.

"It is almost impossible," said this witness, "for me to separate the questions, for the reason that the object of the whole litigation was the consummation of one great result. And I must assume, first, that the legal services, and the business ability, and the legal tact were combined and united to bring about the results that arose from the litigation; not only from the litigation, but from the business negotiation. I have estimated 5 per cent. on a million dollars to be a reasonable compensation for carrying through the negotiations."

William C. Grant had examined hypothetical questions Nos. 1, 2 and 3, and in answer to this question:

"Assuming the facts to be as stated in those three questions, what, in your judgment, would be a reasonable charge or reasonable charges to be made by plaintiffs against the defendants? In other words, what were those services reasonably worth? You can take the questions separately or together as you choose."

He puts down the legal services rendered in the foreclosure bill and bill to redeem at $5,000, while the reduction of the so-called contract from $50,000 to

$10,000, he puts down as worth $10,000, and the remainder of the services anywhere distributed between the three hypothetical statements to which his testimony is limited, he puts at a range from $25,000 to $40,000 dollars.

Thomas Hoyne seems to have only examined the first and second of the hypothetical statements and upon them he bases an opinion that the services were worth from $40,000 to $50,000.

Henry S. Monroe, the last witness who testifies upon this branch of the case, covers by his testimony the five hypothetical statements termed the hypothetical case, and concludes his testimony in the following statement:

"Part of the services that were rendered as described in the hypothetical questions were perhaps unusual to a general practitioner, but I have an idea of them; taking all the services rendered as detailed in all those hypothetical question, $50,000 would be very reasonable. $60,000 would not be excessive."

Accompanying each of the statements of witnesses there is an argument from the witness to the jury in support of the opinion given. These arguments were also objected to by counsel for the plaintiffs in error, but these objections were promptly overruled by the court upon the ground then stated in the presence of the jury, that it was admissible like other reasons which an expert gives to be weighed by the jury; that is, the jury were told that they were not only to weigh the opinions of the experts given to them, but the arguments submitted by them in support of those opinions.

Now we certainly know of no rule of law that would support that ruling, while it is unquestionably contrary to the whole spirit of the law of evidence relating to expert testimony.

A still stronger objection than any we have thus far dwelt upon presents itself upon the rulings of the court in connection with the pleading of the so-called hypothetical statement.

The rule laid down by Greenleaf and other text writers, is that if the facts are doubtful or remain to be found by the jury, hypothetical cases may be submitted to experts and their opinion taken upon them. No rule of law that we know of undertakes to define what may be embraced in what is termed a hypothetical case, but it would naturally be supposed to be a statement of such facts and such facts only, as might be supposed to be involved in the controversy and about which proof had been offered to the jury, and not an attempt to detail specifically what might be assumed to be the testimony intended to establish those facts.

In this case the five propositions which go to make up the hypothetical case submitted by the defendants in error, contains a minute, elaborate, and detailed statement of all possible facts, circumstances, inferences, and opinions, that might be brought in to the defense of the several suits referred to, and the negotiation and sale of the lands involved. The whole hypothetical case occupies 147 printed pages of the record and must have required a full judicial day to read it to the jury. The preparation of it involved more labor, in all probability, than was expended by the defendants in error in the

performance of the services claimed by them to have been rendered by them to the plaintiffs in error. It seems a matter of astonishment to us that the able Judge who tried this case, permitted such an outrage upon the patience of the jury and the time of the Court, as the reading of such a paper in their presence.

The attorneys representing the plaintiffs in error strenuously endeavored to prevent this being done and the manner in which the Judge overruled their objections, as the same appears of record, was certainly not well calculated to secure to the defendants below a favorable consideration of their matters of defense before the jury.

After overruling sundry objections made to the course of procedure adopted by the plaintiffs below, connected with this paper, the Judge, showing his final determination upon all subjects that could possibly be embraced under it, directed the court reporter to put down that Mr. King objects to every question and let him have an exception.

We have looked in vain through the reported cases to find any case that would justify the introduction of such paper before the jury, or even the submission of such paper to a witness within the hearing of the jury.

The case of *Haish* v. *Payson*, in 107 Ill., page 365, is the one most nearly like this in its general features that we have been able to find. That case like the one under consideration, was upon the question arising upon a suit for services of an attorney embracing both legal services and other extra-professional services in the nature of negotiations.

The hypothetical case submitted in that suit covers

less than four pages of the printed opinion in the report, and in remarking upon it the Court say:

"The reading over of this lengthy paper, filled with partial statements of facts, containing conclusions drawn from them, many times in the hearing of the jury, is calculated to possess them most fully with the plaintiff's side of the case, and not leave their minds open to an unbiased consideration of the whole of the facts of the case. Opportunity should not be given for doing this, through the medium of a question put to witnesses. The question is an anomally, and must receive condemnation."

If this strong language could be used with reference to the question then under consideration, what ought to be said with regard to the question under consideration in this case?

But the case of *Haish* v. *Payson* is important upon other branches of this case especially in its application to the testimony of these so-called experts, in which the Court, following the rule that has been well established in suits of this character, that the services, the skill, and the ability of the claimant, and not the benefits that might accrue or did accrue to the defendants, formed the proper basis of the plaintiff's claim, on that point have more to say:

"The idea was held out to the jury that the settlement got by the defendant was a much more favorable one than those made by others, and that that was an advantage obtained by the defendant which should be considered by the jury. The question remarks upon the "important differences" between the settlements as an advantage of the defendant, and upon the price which

"had to be paid by the regular licensees under the patents."

If this was objectionable in the statement of a hypothetical case, it was still more objectionable when the witnesses to whom the questions were addressed, based their judgments and opinions as to value almost exclusively upon the benefits which had accrued to the plaintiffs in error, rather than upon the value and extent of the services rendered by the defendants in error.

The whole case is instructive as bearing upon this under consideration, especially so when it is considered that it is a decision of the Supreme Court of the State of Illinois in reference to transactions on the same theatre and of a similar character to those which are the subject of this contention.

The first sentence of Justice Sheldon in delivering the opinion in that case, well characterizes the leading feature which the trial in this case assumed as presented in the record. The mode of presenting the case to the jury was calculated to draw away the minds of the jury from the true inquiry, namely, what was the extent and value of the professional services rendered, and to greatly exaggerated that value by the contemplation of results rather than the consideration of facts legitimate and proper to be submitted to them.

The charge of the Judge in this case was excepted to, and a number of particular objections are noted in the bill of exceptions. The chief objection to the charge, perhaps, may be found in the fourth specification in the motion for a new trial, which we have incorporated in our assignment of errors. No one can read

the charge without feeling that the sympathies of the Court ran strongly in favor of the defendants in error, and particular prominence was given to all the facts and circumstances which might tend to enhance the value of the services claimed to have been rendered by them, and had unquestionably a tendency to impress upon the jury the bias of the Court. Even the apology which the Judge gave in his instructions for permitting such an outrage as the reading of the so-called hypothetical case in the presence of the jury, did not calculate to correct any unfavorable and unjust impression which they might draw from such a document against the plaintiffs in error.

No one can read the record of the case before this Court without being impressed strongly with the feeling that, independently of any mere errors of law in the specific and particular rulings of the Court, there was not a fair trial of the cause.

We confidently submit this case to the Court as one to be reversed, because it is manifest that justice has not been done.

Respectfully submitted,

JOSEPH E. MCDONALD,

JOHN M. BUTLER,

Of Counsel for Plaintiff in Error.

Indianapolis, October 6, 1886.

120-13

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1886.

CAROLINE M. FORSYTH, IMPLEADED WITH JACOB FORSYTH, *Plaintiff in Error*,
vs.
JAMES R. DOOLITTLE, JAMES R. DOOLITTLE, JR., AND HENRY MCKEY.
No. 107.

SUPPLEMENTAL BRIEF AND ASSIGNMENT OF ERRORS IN BEHALF OF PLAINTIFF IN ERROR.

MCDONALD, BUTLER & MASON,
Of Counsel for Plaintiff in Error.

FRANK H. SMITH, PRINT., INDIANAPOLIS.

PHILADELPHIA BAR ASSOCIATION

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No. 107.

SUPPLEMENTAL BRIEF AND ASSIGNMENT OF ERRORS IN BEHALF OF PLAINTIFF IN ERROR.

Plaintiff in error by way of supplemental brief, and in order that the errors heretofore assigned in plaintiffs' original brief, filed in this cause on the 13th day of October, 1886, may be made more specific and particular, as to the errors so assigned so far as relied upon by plaintiff in error, says:

First: The Court erred in admitting on the trial, against the objection of defendants' counsel, incompetent, irrelevant, and immaterial evidence and testimony

on behalf of said plaintiffs, which said evidence appears in the printed transcript of record in this cause, from pages 25 to 36 inclusive, and together with the objections of defendant thereunto in the Court below, is as follows, to-wit:

Mr. J. R. Doolittle, Jr., on behalf of the plaintiffs, among other things, testified:

I told Mr. Forsyth this: In the first place that we had reached a contract that was accepted by both parties.

Mr. King, counsel for defendant, objected and said: If the Court please, the contract will show for itself what it was. It is not for Mr. Doolittle to get Mr. Forsyth in his office and then explain to him and tell him what he has done and the bearings of the contract. The Court will construe the contract itself, but to have him state what he calls the bearings and the great amount of work and labor performed I object to.

The Court overruled the objection and said: I think any conversation between this witness and Mr. Forsyth upon the subject matter, or its legal effect, is admissible, tending to show what was done; that is all. If he explained to him I think he has a right to state that as a part of the work. I don't think any attorney ever had much to do with a complicated contract of this character that he did not find it necessary to explain some of the provisions to his client; that is part of his labor, and the jury will judge.

Mr. King, counsel for the defendant: The explanation of the contract to the jury?

The Court: Yes.

Mr. King, counsel for defendant: I don't think it is competent.

The Court: I will allow it.

To which ruling of the Court counsel for defendant then and there duly excepted.

The witness continued: I told Mr. Forsyth he had come out of the negotiation better than I had hoped for; that we had got a contract acceptable to both parties, and I had swept away all talk about bonds; that I thought that was an immense advantage. We were not now required to look into the power of corporations to acquire land in Indiana; that, although the extension of the option went to the 10th of November, the purchaser must accept or reject by the 10th of September; that as to the extension of the deferred payments during seven years, it made no difference, because, if the interest was not paid, the whole amount would be declared due and a foreclosure made; that interest would have to be payed every fifteen days until the parties gave notice they abandoned the contract; that when Ord signed the contract of June 10th the question of Weston's authority to pay $10,000 was settled.

Objection by the counsel for defendant to the above advice to Mr. Forsyth. Objection overruled; to which ruling counsel for defendant then and there duly excepted.

The witness was asked by plaintiffs' counsel: Do you remember any other point of importance on this passing of the title?

A. Well, there was a matter of some importance

connected with the transaction that I have not touched upon yet.

Counsel for defendant said: I object, your honor, to his characterizing whether it was a matter of importance or not. Let him state the facts, and the court and jury will judge of its importance.

The Court overruled the objection, and counsel for defendant then and there duly excepted.

The witness continued: It was this: There was a war between Bennett and Hardin, which was linked in with the parties who were purchasing from the Forsyths, and if the latter took sides it might endanger their sale of the land, and Mr. Hardin called at our office and we had a long interview there in regard to this matter, during which witness advised him that the Forsyths could not take sides with him, while, at the same time, the ground they took in relation to riparian rights was the same ground taken by Hardin.

A. J. Averill testified: Engaged in the real estate business, in the city of Chicago, twenty-two years; have examined the Forsyth tract of land; is composed largely of swales and sand ridges; not to exceed 1,000 acres in the 8,000 tract could be cultivated; nearest point about sixteen miles from court house in Chicago; by expenditure of a good deal of money it might be suitable for manufacturing purposes; harbor would have to be opened into Wolf Lake from Lake Michigan; should think it purely speculative property, its chief value being for development by construction of harbor facilities for transaction of commercial business; is not suitable for farming, but its proximity to Chicago makes it pos-

sible; in future developments about the city it might be available for manufacturing and other purposes as a suburb of Chicago.

Counsel for defendant objected to the witness testifying as to the character of the land and its adaptability or otherwise to farming or other purposes, and as to its being speculative property or the contrary. Objection overruled by the Court, to which ruling counsel for defendant then and there duly excepted.

Joseph B. Chandler testified: That he knew plaintiffs and Jacob Forsyth; that in November, 1881, after consummation of sale, he met Forsyth and Mr. Doolittle, Jr., and congratulated Forsyth upon his successful negotiation of his property, and that Forsyth, with a wave of the hand and a very graceful bow, turned to Mr. Doolittle, and remarked that witness should congratulate Mr. Doolittle.

Said conversation objected to by counsel for defendant, as immaterial. Objection overruled, and exception to such ruling by counsel for defendant.

Isaac N. Hardin testified: That he had conversation with Mr. Forsyth relative to Weston option contract, after contract was given and before Weston returned from New York; that Forsyth said he was fearful Weston would not carry out the arrangement, and that the paper given Weston might complicate the land, and perhaps prevent sale through other channels, and desired to make demand on Horne for return of the paper or completion of the arrangement, and desired witness to go to Belt Line office and witness such demand; that other parties were trying to negotiate for purchase

of the land, and he had kept them off in view of this matter with Weston, and asked advice of witness as to propriety of opening such negotiations; that one party desired a price to be set on the land, and that price was $600,000.00; that he would have to pay commission, and the amount realized would be considerably less than $500,000.00; he desired my advice; that witness advised him he had better sell for any substantial sum above the mortgage, and not to let the opportunity pass to get two or three hundred thousand dollars above the mortgage, and not wait longer upon Weston; that after the sale took place Forsyth said to witness it had been his very great good fortune in securing Judge Doolittle and his son as his counsel; that, giving character to the transaction, had aided largely the result of the sale.

Counsel for defendants objected to the testimony of this witness, and moved to strike out the same as immaterial; which objection and motion were overruled, to which ruling counsel for defendants duly excepted.

DEPOSITION OF JOSEPH P. ORD READ.

Joseph P. Ord testified: Know all the parties to the suit. First met Mr. Doolittle, Jr., July 11, 1881; met the Forsyths about the same time; made a contract in writing with the Forsyths in 1881. (Contract introduced in evidence, "Plaintiffs' Exhibit 5," shown elsewhere.) I think it was signed in May, in New York; gave it to my attorneys, Alexander & Green, to send to Chicago for signatures of other parties. There was no agent of mine in Chicago for that purpose. It was probably sent by Alexander & Green to Milton Weston. Weston had no authority from me to alter or modify the terms of that contract.

Objection by counsel for defendant to the last statement of the witness and the question calling out such answer. Objection overruled, to which ruling counsel for defendant then and there duly excepted.

Weston was a mere messenger. I cannot recall when I first saw the contract of June 10. Went to Chicago with reference to it about July 10.

Witness testified to interviews and discussions in July between himself, Mr. Mason, Mr. Simpson and Mr. Doolittle, Jr., relative to the contracts, substantially as testified to by Mr. Doolittle, Jr.

Counsel for defendants objected to the testimony of the witness in relation thereto as incompetent and immaterial, which objection was overruled by the Court, to which ruling counsel for defendants then and there duly excepted.

Two supplemental clauses submitted July 21. (Introduced in evidence, marked, respectively, "Plaintiffs' Exhibits 6 and 7.")

Counsel for defendant objected to the same, and each thereof, as immaterial, irrelevant and incompetent. Objection overruled by the Court, to which ruling counsel for defendant then and there duly excepted.

Mr. Simpson arrived in Chicago July 27 and left August 6; contracts of June 10 and August 4 executed by me at the same time. In these interviews Mr. Doolittle assumed to represent Mrs. Forsyth; saw Mr. Doolittle in New York. He wanted the mode of payment as provided in the contracts modified; wanted to raise some money, about $100,000, by anticipation of the pay-

ment of $333,000, and proposed the security of a mortgage; declined the proposition about the money; arrived at and executed an agreement, dated September 28. The first time that a contract existed between me and the Forsyths was when I signed the contract dated June 10, and that of August 4, which was on the 5th day of August.

Objection by counsel for defendant to the witness testifying to a conclusion, not stating facts. Objection overruled by the Court, to which ruling counsel for defendant then and there duly excepted.

Was instructed on going to Chicago to secure execution of a contract identical with the one I had sent, or as near thereto as possible. On my arrival there, said to Mr. Doolittle and Mr. Forsyth that, unless the contract I had executed was signed, the businses was off.

Objection hy counsel for defendant to what the witness stated as immaterial, incompetent and irrelevant. Objection overruled; to which ruling counsel for defendant then and there duly excepted.

Upon his cross examination by Mr. King, as counsel for the defendant, Mr. Ord testified as follows:

Question by Mr. King, counsel for defendant: Have you any interest in James R. Doolittle, Jr. particularly?

A. I have a social and friendly interest in him.

Q. No pecuniary interest in Mr. Doolittle?

A. Certainly not. I have no interest whatever in this matter in any way, shape or form, except I am anxious to testify to the great ability which Mr. Doolittle showed, both as a lawyer and negotiator, holding up

the price of this land in a long series of negotiations, when he was dealing with men who are very shrewd, and one of whom is noted as being particularly able in making what is called a trade. I am glad to testify to it. I have given up a great deal or time in coming to this office, in order that Mr. Doolittle may have the benefit of my knowledge of the facts in this transaction, because I want to see him paid for his services, and because, so far as I am concerned, I would be glad that it should be generally known how much ability, how much zeal, how much legal knowledge he showed in all these transactions, which, I believe, were carried on and were completed entirely by his efforts.

Mr. King (interrupting): Your belief is not asked for, and I object, and ask that your belief be stricken out as immaterial and incompetent testimony.

Objection and motion overruled, and exception by counsel for defendant.

The witness continuing: Then I desire to state as a fact that this whole negotiation was conducted with Mr. Doolittle.

The witness was asked by plaintiffs' counsel his opinion as to the character and professional quality of the services rendered by the plaintiffs in the negotiations, to which witness testified, limiting his opinion to the facts which transpired under his personal observation.

Counsel for defendant objected to the question, that the witness should state facts, and leave it for the jury to form conclusions, and that it was not the province of the witness to state his conclusions or opinions. Ob-

jection overruled by the Court; to which ruling counse for defendant then and there duly excepted.

The witness answered that the character of the services was a double, or, rather, a dual one. First, there was a negotiation—I may say trade—and in all this trade, in Mr. Doolittle, Jr.'s, participation in the transaction, he showed a great deal of confidence, and his whole bearing in these negotiations was such that it did not occur to me that any attempt to bargain—I mean to cut down—the sum which had been suggested, towit, a million dollars, would be successful. He seemed very reliant, and the best evidence, to my mind, of the characier of this transaction was its success, viz, that we paid the price he asked. At the end of several weeks' discussion, extending all over this matter, Mr. Doolittle obtained my signature to the contract, agreeing to pay the price which he had asked, or which his clients had asked. I consider that negotiation to have been a very successful one on the part of Mr. Doolittle. As to the quality of his services, they were of a very high order, in my judgment, of ability, unusually so.

Answer of witness objected to by counsel for defendant. Objection overruled; to which ruling counsel for defendant then and there duly excepted.

Witness continuing: Was admitted as a lawyer in New York in 1877; have practiced law very little; almost none, in the sense of trying cases; was generally connected with business that had elements of law in it—general sort of business; have always done business for lawyers, and my associations have always been with them. I was protected by a bond of indemnity, by the

promoters, against personal liability on my part in the transaction.

JOHN W. SIMPSON'S DEPOSITION READ.

John W. Simpson testified: Am a lawyer in New York City; connected with the firm of Alexander & Green; first met the plaintiffs in Chicago, in the latter part of July, 1881; that he came as counsel for Mr. Ord, the purchaser.

Witness testified to interviews and discussions, as attorney and counsel for the purchaser, with James R. Doolittle, Jr., as attorney and counsel for the defendfendants, re'ative to the contracts, substantially as testified to by Mr. Doolittle, Jr.

Witness testified as follows:

Q. Do you remember whether Mr. Doolittle, in the negotiation with you upon this subject, required the acceptance by Mr. Ord of the contract of June 10, 1881, which had been executed by Mr. and Mrs. Forsyth?

A. Yes, I remember that that was a subject of considerable discussion between us in this way: We took the position that the contract of June 10, 1881, which was no contract, in the sense that it was executed by only one party; we took the position that it was of no binding force at all; we could not accept it, and we would not execute it. Mr. Doolittle, Jr., all through the discussion, put forward the point that this agreement, which was to embody the ultimate result of the negotiation, should be drawn on the theory that it was a modification of the agreement of June 10, 1881; in other words we were not to start *de novo*, but to start

with the agreement of June 10 in force, and modify it to suit the views on both sides.

Q. When was the contract of June 10 accepted by Mr. Ord?

A. Simultaneously with the execution of this paper—(the contract of August 4th.)

Q. When and by what mode, if at all, was an agreement reached between Joseph P. Ord and Caroline M. and Jacob Forsyth?

A. An agreement was reached between them when this paper and the so-called agreement of June 10th were executed; I refer to the contract of August 4th; the purchasers did not consider themselves as bound until the contract of August 4th was executed.

Counsel for defendant objected to the last statement of the witness. Objection overruled by the Court; to which ruling counsel for defendant then and there duly excepted.

Q. In the negotiation which occured between you, or the interviews which occured between you and the plaintiff, J. R. Doolittle, Jr., at Chicago, what, if anything, did you state as to the authority of Milton Weston to make the payment of $10,000 upon the contract of June 10th?

Objected to as incompetent and immaterial.

A. I stated that Mr. Weston had no authority to make that payment of $10,000 except upon the execution and delivery of this contract. (Plaintiffs' Exhibit 5.)

Last statement of the witness objected to. Objec-

tion overruled; to which ruling counsel for defendant then and there duly excepted.

Witness stated: Was admitted to the bar in June, 1873; have been engaged in the real estate branch of the legal business of Alexander & Green, examination of titles and foreclosing mortgages; since 1880 have been engaged in corporation business; some of the matters were of importance, involving large amounts; have been engaged in negotiations between parties—not as negotimyself, but knew what transpired. So far as I was concerned, J. R. Doolittle, Jr., and J. R. Doolittle, Sr., represented the Forsyths.

The witness stated that he was actiug as attorney and counsel for the purchasers.

Witness was asked by plaintiffs' counsel this question. Are you able to state, from the participation which you personally had in the negotiations with the plaintiffs at Chicago and New York, the character and quality of the services rendered by the plaintiffs in the said negotiations in which you took part?

Counsel for defendant objected thereto as incompetent and immaterial; that the witness should state facts, not state conclusions or opinions, as to the quality or character of the services. Objection overruled; to which ruling counsel for defendant then and there duly excepted.

Witness, in answer, stated that in his judgment the services of the plaintiffs in behalf of the defendants in the matters testified to by the witness were of the very highest character and of the very best quality; that, in the judgment of witness, plaintiffs managed the case

with great sagacity and with great skill; that such was the opinion formed by witness at the conclusion of the business.

Above answer objected to by counsel for defendant as incompetent; that the witness should detail facts, not state conclusions. Objection overruled; to which ruling counsel for defendant then and there duly excepted.

Witness was asked by plaintiffs' counsel to state from his position in such negotiations as occured while he was at Chicago, as the counsel of Mr. Ord, whether he could state who it was who brought about the agreement of the parties expresed in the contracts referred to as the contracts of June 10th and August 4th.

Objected thereto by counsel for defendant as incompetent for witness to state the conclusions called for; that it was a question for the jury to determine from the facts shown by the evidence. Objection overruled by the Court; to which ruling counsel for defendant then and there duly excepted.

In answer witness stated that those contracts were brought about by Mr. Doolittle, Jr., with the aid, in one or two emergencies (I am stating simply what I know of my own observations), of Mr. Doolittle, Sr., on the one side, and Senator Barnum and myself on the other.

Witness, in answer further, testified: Execution of the contracts by Ord was secured by the services of plaintiffs; that was not an opinion; the witness knew that to be a fact.

Answer objected to for the same reasons last above mentioned. Objections overruled; to which ruling counsel for defendant then and there duly execpted.

Witness further testified: In general I knew the situation upon the other side of the negotiation at that time. I knew that that situation was such, although the plaintiffs may not have known it, that it was a very delicate and difficult matter to carry those negotiations to a successful conclusion. I knew that the matter of time was a serious element in the situation; that a delay of a few weeks in concluding that negotiation would have ended it. I fancy that a delay of a few days would have ended it; and the manner in which that appears significant to me, as to the value of the services of the plaintiffs, is this: If the plaintiffs had not been sagacious enough to persuade us that they were entirely indifferent to the success of this negotiation; that they had fixed their terms and their price, and would stand to them or lose the sale; if we had been led to doubt that we would have to pay the price stated for the land and and take it on the terms stated finally, we should not have closed the negotiations. That we did not have any such doubt was owing to the judgment of the plaintiffs. If we had not taken it then, if we had stopped to dally for a lower price and compare terms, the time would have gone by when we would have taken it at all, or else we would have had it at a very much lower price.

The above statement and testimony of the witness was objected to by counsel for defendant as immaterial, incompetent, and irrelevant, as giving the impressions and opinions of the witness, and not detailing facts. Objection overruled by the Court. To which ruling counsel for defendant then and there duly excepted.

WILLIAM D. GULLIVER'S DEPOSITION READ:

William C. Gulliver testified: Am a lawyer in New York City; know about the contracts between Ord and Forsyth; saw Defendant's Exhibit "A" latter part of May; was engaged in drawing contract between Ord and Mrs. Forsyth and Jacob Forsyth; prepared contract shown as Plaintiffs' Exhibit 5; Mr. Milton Weston first brought the subject-matter to my notice.

Witness was asked what representations Weston made in regard to the payment of the million dollars for the land.

Objected to by counsel for defendant as immaterial, incompetent, and irrelevant, and the objection was sustained by the Court. But afterwards, during the progress of the trial, evidence having been given tending to show that Weston was acting as the agent for, and in behalf of, the Forsyths in the negotiation of the sale of the land to the New York parties, the Court overruled the objection and allowed the answer of the witness to the question to be read to the jury, to which counsel for the defendant excepted.

In answer, witness testified: Weston's statement to me was something to this effect: That a contract in the nature or an option could be had extending over a reasonable time, represented to be flexible, to be secured by a payment in cash of $10,000. That the owner of the land wanted the equivalent of a million of dollars for these 8,000 acres. That, for certain reasons which he named, they wanted one-third of this sum to be paid at the expiration of this option, whenever that should occur upon the date, to be made in cash; that the

remaining two-thirds of a million could be paid either in bonds of a company to be organized for the acquirement of the property or by conveyance or reconveyance to the grantors of an undivided two-thirds of the property, or by any sort of an arrangement which would secure the grantors practically one-third of a million in cash and a reasonable equivalent for the other two-thirds of a million. That the first one-third of a million was to be paid in cash; that the remaining two-thirds was open to negotiation.

Answer objected to as incompetent, improper, and irrelevant, and immaterial, by counsel for defendant. Objection overruled. To which ruling counsel for defendant then and there duly excepted.

Contract shown as Complainants' Exhibit 5 was signed by Ord and handed to Weston to be delivered to Mr. and Mrs. Forsyth on execution of duplicate by them. At the same time I gave Weston a check for $10,000, to be used in making first payment on this contract, as drawn by me, whenever the duplicate of the contract should have been executed and delivered to him by Mr. and Mrs. Forsyth.

Witness was asked as to what limitation to the power of Weston was imposed by him, and if a receipt was taken from him.

Objection thereto by counsel for defendant. Objection overruled; to which ruling counsel for defendant then and there duly excepted.

Witness answered that he did not impose limitation, and produced a receipt.

Said receipt offered in evidence. Objection thereto

by counsel for defendant. Objection overruled; to which ruling counsel for defendant then and there duly excepted.

Said receipt is as follows:

"NEW YORK, JUNE 1st, 1881.

Received from William C. Gulliver, trustee, ten thousand dollars, to be used by me in making first payment on the contract between Jacob Forsyth and wife and Joseph P. Ord, dated June—, 1881, the same not to be paid by me or used until the blanks existing in said contract shall have been correctly filled in, and until the description of the land therein contained shall have been verified and made entirely correct, and until the said contract shall have been executed and delivered by the said Forsyth and wife; also $100 on account of general expenses.

CHICAGO BELT LINE RAILROAD COMPANY.

(Signed) MILTON WESTON, *President.*"

I never was consulted about it (the contract of June 10.)I may have seen it since. I cannot be positive about that. I know I did not see it before execution, because I never would have permitted the parties to have signed the contract if I had seen it, or been consulted about it.

Objected to by defendants' counsel as irrelevant and incompetent. Objection overruled; to which ruling counsel for the defendant then and there duly excepted.

Took part in the consummation of the sale; gave Messrs. Mason instructions in regard to form of the deed; went to Chicago with funds to make the payment; was at Crown Point when the papers were exchanged. So far as I could see, Mr. Doolittle, Jr., directed all the

details of the transaction on behalf of the Forsyths; met him at Indianapolis in regard to proceedings there, referred to in the contract, relative to bill to redeem; have practiced law about twelve years.

Witness was asked as to what class of matters or transactions he had been engaged in professionally.

Objection by counsel for defendant. Objection overruled; to which ruling counsel for defendant then and there duly excepted.

In answer, witness stated he had been connected with some important matters; almost exclusively represented corporations in the matter of the organization of corporations, railroads, life and fire insurance companies, railroad companies, real estate companies, manufacturing companies of all sorts, mining corporations, and matters connected therewith, litigated or otherwise; also participated in negotiating for the purchase of property involving large amounts; that his experience in the matter of negotiating contracts had been such that he could state an opinion in regard to the value of services in the matter of negotiating contracts involving large amounts.

Above answer objected to by counsel for defendant. Objection overruled; to which ruling counsel for defendant then and there duly excepted.

Witness further stated, on cross-examination, that he had had professional business with lawyers in Chicago and in other cities; that he had considerable familiarity with the usual and customary charges of lawyers in the city of Chicago in regard to legal services, and that he had found a want of uniformity of charges of

lawyers in Chicago; had paid bills of lawyers in Chicago, in a number of instances, for professional services, during the last ten years, of almost all kinds, viz.: Williams & Thompson, Van H. Higgins, Leonard Swett, E. B. McCagg, or his firm, Trumbull's firm, Trumbull & Trumbull, and Mason Bros.

It further appeared, on cross-examination, that, in connection with his New York practice, the witness had been engaged in special cases in the States of Vermont, Connecticut, Ohio, Pennsylvania, Georgia, Indiana, Illinois, the Province of Ontario, Canada, State of New Jersey, and in other States, indirectly in the management of affairs, or litigations connected with clients in the State of New York; that his practice in Illinois was mostly in railroad foreclosures in the United States Circuit Court, and for a couple of years he had charge of a patent suit pending before Judge Drummond, in Chicago; had been associated with the firm of Alexander & Green for about ten years; declined to state in what capacity.

The counsel for the plaintiff then propounded to the witness a printed hypothetical statement and question. (Said statement is in the same words as shown as hypothetical statement No. 1, in the testimony of Leonard Swett.)

The witness having testified that he had read said question was then asked to answer the same.

Said question was objected to by counsel for defendant, on the ground that witness had not been shown to know the usual and customary fees charged by lawyers in Chicago, where plaintiffs were employed and

where their office was during such employment, and, therefore, the witness is not competent to testify; that to enable the witness to be competent to testify on the subject of plaintiff's fees the witness must know, and the facts must show, that he knows what are the usual and customary fees usually charged by lawyers in Chicago for like services or for similar services; that the question is improper to be put to any witness, and especially to this witness; that a large portion of the question is based upon an assumption contrary to the facts; that the witness is incompetent to testify on the subject. The question was also objected to on the trial for the same reasons as set forth elsewhere in the objections to the hypothetical questions in testimony of Leonard Swett. Objections overruled. To which ruling counsel for defendant then and there duly excepted.

Witness answered that the strictly legal services indicated in the question, viz., interpretation of the various contracts, drawing of the contracts, and advice as to their legal effect, was worth $5,000; that, as witness understood the facts set forth in the question, plaintiff's services were, to a large extent, extraprotessional, that of negotiators, by which the defendants seemed to have been saved a considerable sum of money; and for these services, as distinguished from the strictly legal services, I should regard a proper compensation about $40,000.

The witness was asked by plaintiffs' counsel the following question:

Has your experience in the matter of the negotiation of contracts involving amounts of a quarter of a

million and upwards been such that you can state an opinion in regard to the value of services in the matter of negotiating contracts of that character?

Objected to by defendants' counsel as immaterial and incompetent.

The Court to the reported: Put it down that Mr. King objects to every question and let him have an exception.

Mr. King: And an exception to everything.

The Court: Yes.

Second. The Court erred in excluding on the trial competent material, and pertinent evidence and testimony offered on behalf of said defendant, which said evidence appears in the printed record in this cause, on page 192, and is as follows, to-wit:

Daniel H. Horne, on behalf of the defendant, testified that he had a conversation with Mr. Barnum, June 24, in Chicago. He wanted to know if the contract with Mr. Forsyth had been signed and sent on, and the $10,000.00 paid. He was anxious before he he went East to know the fact. Told him it had been signed and the money had been paid. He expressed great satisfaction.

On motion of counsel for plaintiffs, the above conversation with Mr. Barnum, it not appearing that either plaintiff was present, was excluded by the Court and ordered to be stricken out, to which ruling of the Court counsel for defendant then and there duly excepted.

Counsel for defendant then offered to prove by the witness that Mr. Ord expressed to witness great satisfaction with the land, and said that it was the biggest

purchase they had made, and that they would make more money out of that than any other purchase they had made or contemplated; that this conversation was on the 14th day of July.

Objected to by counsel for plaintiff, it not appearing that either plaintiff was present. Objection sustained, to which ruling the counsel for defendant then and there duly excepted.

Third. The Court erred in refusing to charge or instruct the jury in accordance with the requests of counsel for said defendant, and which requests were proper and legal, and the defendant was entitled to have the jury charged and instructed in accordance with said requests.

Fourth. The Court, in the charge to the jury, gave particular prominence to the evidence for the plaintiffs, and what such evidence tended to prove, and did not give equal prominence to many salient features of the defendant's evidence, and did not fully and sufficiently explain the bearing and significance and tendency of portions of the evidence in the case particularly favorable to the defendant, and the charge of the Court, taken as a whole, had an unquestionable tendency to impress upon the jury a view of the case especially favorable to the plaintiffs, and the jury were greatly influenced by the charge of the Court in favor of the plaintiffs, and for that reason ignored to a large extent in arriving at their verdict the points in the evidence weighing in favor of the defendant and the true bearing and significance of such evidence. The charge erroneously instructed the jury what the plaintiffs' evidence tended to prove. The charge was in many other respects erroneous.

The portions of which said charge, to which defendant at the time excepted, and now assign for error, appear in the printed record in this cause, page 210 to 213, inclusive, and are as follows, towit:

"That the proof in the case tends to show, and is not contradicted in this particular, that the land in question lies in the northwest corner of the State of Indiana, upon the southern margin of Lake Michigan, is intersected by several small lakes or bayous, and consists mainly of low sand ridges and grassy swales; that only a small fraction of it is fit for agricultural purposes; that its chief element of value is its adaptability, by reason of its close proximity to the city of Chicago, to improvement by the construction of a harbor, docks, and other facilities for various uses, such as lumber yards, manufactories, slaughtering and packing houses, etc., as a business suburb of the city of Chicago."

* * * * * * * *

"That the proof on the part of the plaintiffs tends to show that the plaintiffs were consulted as to the terms of the option contract, as it is called, of May 11, and that they rendered valuable services in framing this contract and suggesting its terms."

* * * * * * * *

"Plaintiffs' proof further tends to show that on the receipt of the Ord contract plaintiffs were consulted by Mr. Forsyth, as the representative of Mrs. Forsyth, and the plaintiffs advised that it should not be signed, and that material and important modifications were, at the suggestion of Mr. J. R. Doolittle, Jr., who was chiefly consulted, made in the contract before they would advise Mrs. Forsyth to sign it."

* * * * * * * *

"The plaintiffs contend that the changes made in the original Ord contract were not acceptable to Ord and his associates; that the contract of June 10, signed by Mrs. Forsyth, differing so materially from that signed by Ord, that there was really then, after the signing of the contract of June 10 by Mrs. Forsyth, no contract between them, and that the Forsyths were liable to refund to Ord and his associates the $10,000 which had been paid over by Weston on the signing by Mrs. Forsyth of the June 10 contract; that, growing out of this complication, there was a long and protracted negotiation, in which Ord and his counsel, Mr. A. B. Mason, and subsequently Mr. Simpson and Senator Barnum, of Connecticut, participated on the part of the purchasers, and in which the interests of the Forsyths were represented by the plaintiffs, principally by Mr. J. R. Doolittle, Jr., and that finally the minds of the parties as to the various terms of this option contract of purchase, and the manner in which the notice of election on the part of the purchasers to take or not to take the property and consummate the transaction, were finally settled on or about the 4th of August, 1881, at which time Ord signed the contract of June 10, and both parties signed the contract of August 4, which was supplemental to the contract of June 10."

* * * * * * * *

"The plaintiffs' proof further tends to show that in and about all the matters leading up to the final conclusion of this important transaction they took an active laborious, and responsible part, and that they participated in the negotiation and took a leading and responsible

part in behalf of the sellars in suggesting, discussing, and settling the terms of the several contracts."

* * * * * * * *

"That a suit was commenced in the Circuit Court of Lake County, Indiana, where the land was situated, for the purpose of enforcing the specific performance of a pretended sale by Tremearne made to Petherick under this power of attorney and letter, and that it became a delicate and difficult task to satisfy the attorneys of Ord and the purchasers, in the face of this hostile title by Tremearne, that there was not danger in taking Forsyth's title."

* * * * * * * *

"In addition to these services, which the plaintiffs claim involved a large amount of labor and a high degree of ability as lawyers or negotiators to retain the confidence of the purchasers and their attorneys, not only in the desirability of the purchase, but of the ability of the Forsyths to make a good title, notwithstanding the complications and difficulties by which this title was hampered and embarrassed, the plaintiffs have offered proof tending to show that they performed valuable services for the defendant in the several suits to which I have, so far, only incidentally alluded."

* * * * * * * *

"Plaintiffs' testimony also tends to show that at the time they rendered these services the defendant was unable to pay them; that the defendant promised that if the negotiations with Ord and his associates was successful they should be liberally and generously paid."

* * * * * * * *

"In regard to the position that plaintiffs agreed that their compensation should be fixed by Mr. Forsyth, I say to you—

"First. That plaintiffs have offered testimony tending to show that no such agreement or understanding was ever had between the parties. In other words, they have given testimony tending to deny the defendants' proof in that regard, and you must say whether there was, from all the proof, such an agreement.

"Second. That if you believe from the proof that such an understanding was had, it does not allow Mr. Forsyth to arbitrarily fix an inadequate or unreasonably low price, but he would still as arbitrator be bound to pay and adjust the compensation of the plaintiffs at a fair and reasonable price for the services rendered."

* * * * * * * *

"In this case it is quite palpable that the result of the case depends almost wholly upon whether you accept the statements of the witnesses who have testified for the plaintiffs, or those who have testified for the defendants."

* * * * * * *

"You can readily understand that any good lawyer who was fully advised as to the facts upon which that depended might be of opinion that Tremearne would fail to sustain his case when brought to hearing. yet it may have been a very difficult and delicate piece of work to so present that case to the attorney of the purchasers as to quiet all fears, and so far assure him that the defense must be successful as to induce him to advise the purchaser to accept the title in the face of the pending

Tremearne suit. And you are to say, in the light of the proof, whether there was at any time any danger that the sale would be defeated from this cause, and whether the plaintiffs rendered any and what services in the matter of piloting the defendant, so to speak, over this dangerous crisis, if there was such a crisis, in the pending sale."

* * * * * * *

"So also, if the compensation of the plaintiffs was, by express agreement, to be liberal and generous in case a sale should be completed, while if the sale failed it would manifestly leave the defendant in such a pecuniary condition that she could pay little or nothing, or make the compensation of the plaintiffs precarious and uncertain; that is a fact which you are to consider with the other facts in the case, assuming of course that the proof satisfies you that the compensation was to be made generous in case a sale went through."

* * * * * * *

"If the proof satisfies you that the plaintiffs performed for the defendant these services stated in plaintiffs' five hypothetical questions, then you may properly consider the answers made to these questions, by the witnesses called in behalf of the plaintiffs, as to the value of the services."

* * * * * * *

"As to the nature and extent of the services rendered by the plaintiffs you are to say from the proof, when all taken and considered together, whether the plaintiffs were employed by the defendants to act in the capacity of negotiators as well as attorneys, and if you

are satisfied, from the proof, that they were so employed and did so act as negotiators, then they are entitled to compensation for their services as negotiators. Although the plaintiffs are lawyers by profession, that does not prevent them from acting as negotiators if so employed by a client. The function or duty of a negotiator is not necessarily and alone that of a mere broker, to bring buyer and seller together; but, especially in large transactions in regard to real estate and other large interests, it may require the exercise of a very high order of talent to properly present the advantages of a purchase and arrange terms of payment so as to meet the views of both buyer and seller. Your own common knowledge of business affairs has undoubtedly taught you that if one man owns a large tract of real estate and is willing to sell it at a given price, there may yet remain much to be done, especially if part of the purchase-money is to be paid at a future date, in settling the terms of the security and making all needful provisions as to future contingencies in the event of non payment, which will, as far as skill and ability can do, prevent entangling complications and loss in the future, and that often much more than mere techanical skill in drawing contracts is required in settling what shall be expressed or stated in those contracts.

You will also readily see, from the nature of the property which was the subject matter of the sale, the uncertainty which existed almost up to last day that the option contract remained in force as to whether Mr. Ord and his associates would take the property, that there was a necessity for the exercise by some one on

the part of the Forsyths, of very great sagacity, foresight and shrewdness to prevent the title to the property from being so clouded by this transaction as to seriously impair its selling value to others in case this proposed sale should fail. * * * *

You may properly take into the consideration the fact that, from the inception of this negotiation up to about the 8th of November, Ord and his associates had not committed themselves to the purchase, and that they could have retired from the field with only a loss by forfeiture of the comparatively small sum which had up to that time been paid; that is the $10,000.00 paid on the 10th of June and the interest; and you may, from your own knowledge of affairs, assume that to have secured the final consummation of such a contract which held both parties in suspense and uncertainty during about six months, and which was at any time liable to be broken up and defeated, required a high order of negotiating ability.

Fifth. The Court erred in allowing any of the so-called hypothetical questions to be read by the jury and propounded to the expert witnesses called and examined on behalf of the plaintiffs, in manner and form as the same as was done on the trial, said so-called hypothetical questions, and each and every thereof, being incompetent and erroneous in form and substance, containing, as they do, absolute statements and assertions of facts and numerous conclusions drawn from such asserted facts, and thus calculated to fully possess the minds of the jury with the plaintiffs' side of the case, and not leave the minds of the jury open to an

unbiased consideration of all the facts in the case as shown by the testimony.

Which said hypothetical questions appear in full in the printed record in this cause, pages 36 to 183, inclusive, and set forth in substance statements upon the following subjects of employment in the order indicated as follows, towit:

No. 1. Negotiations and preparation of contracts of sale to Ord of the 8,000-acre tract.

No. 2. Reduction of Horne commission from $50,000 to $10,000.

No. 3. Litigation about the mortgage for $163,000 and other claims embraced in it.

No. 4. Defense of the title against the Tremearne' or London, suit.

No. 5. Preparation of the mortgage to secure the deferred payment of $666,666.66.

The testimony, together with the objections of defendant thereto, given in answer and in relation to said hypothetical questions, appears in the record, pages 35 to 36, inclusive, and pages 183 to 191, inclusive, and is as follows, towit:

The counsel for the plaintiff then propounded to the witness a printed hypothetical statement and question. (Said statement is in the same words as shown as hypothetical statement No. 1 in the testimony of Leonard Swett.)

The witness having testified that he had read said question, was then asked to answer the same.

Said question was objected to by counsel for defend-

ant, on the ground that witness had not been shown, to know the usual and customary fees, charged by lawyers in Chicago, where plaintiffs were employed, and where their office was during such employment, and therefore the witness is not competent to testify; that to enable the witnesses to be competent to testify on the subject of plaintiffs' fees, the witness must know and the facts must show that he knows what are the usual and customary fees usually charged by lawyers in Chicago for like services or for similar services; that the question is improper to be put to any witness, and especially to this witness; that a large portion of the question is based upon an assumption contrary to the facts; that the witness is incompetent to testify on the subject.

The question was also objected to on the trial for the same reasons as set forth elsewhere in the objections to the hypothetical questions in the testimony of Lonard Swett.

Objections overruled; to which ruling counsel for defendant then and there duly excepted.

Witness answered that the strictly legal services indicated in the question, viz.: interpretation of the various contracts, drawing of the contracts and advice as to their legal effect was worth $5,000; that as witness understood the facts set forth in the question, plaintiff's services were to a large extent extra-professional; that of negotiators by which the defendants seem to have been saved a considerable sum of money, and for these services, as distinguished from the strictly legal services, I should regard a proper compensation about $40,000.

The witness was asked by plaintiffs' counsel the following questions:

Has your experience in the matter of the negotiation of contracts involving amounts of a quarter of a million and upwards been such that you can state an opinion in regard to the value of services in the matter of negotiating contracts of that character?

Objected to by defendants' counsel as immaterial and incompetent.

The Court, to the reporter:

Put it down that Mr. King objects to every question, and let him have an exception.

Mr. King: And an exception to everything.

The Court: Yes.

Leonard Sweet, called by plaintiffs, testified:

Am a lawyer; practiced law since 1849; in Chicago since 1865.

Five hypothetical questions or statements were read by the counsel for the plaintiffs in the presence of the court and jury, and certain members of the bar of Chicago called and sworn as expert witnesses.

Leonard Swett continuing:

Counsel for defendant objected to the question or questions contained in five parts, as above set forth, and to each and every one of those parts as follows:

That they are, and each of them is, of a structure wholly incompatible with any just conception of a proper hypothetical question; that the question is replete with absolute assertions of fact; that the questions extend into the domain of pure speculation; that the great body of the questions partake more of the character of a high-sounding prologue than of a plain, simple, com-

prehensive question to be put to a witness, even though a lawyer, in a trial before a jury. The questions not only abound with strong adjectives and many oratorical and rhetorical expletives, but embody a vigorous argument of the great magnitude of the services which the plaintiffs have rendered for the defendant in the rescuing of the defendant from impending perils, and the questions were read before the jury with rhetorical and dramatic flourishes and intonations, with the evident intention of influencing the jury. The questions partake much more of an argument to the jury than hypothetical questions; that the length of the questions (the five parts occupying 225 pages of any of our standard law reports) renders them objectionable, and it ought not to be allowed or tolerated; that the witness is not shown to have been competent to testify to the value of the services rendered, as mentioned and referred to in the question, and also is not competent to testify to the value of the services of the plaintiffs as negotiators, but only to the value of legal services; that the questions are presumably addressed to lawyers as experts, and from their construction are evidently intended to influence the jury; that pleadings, bills in chancery, answers, and other papers are set out in *hæc verba*; the lawyers to whom the questions are addressed and presented are presumed to know what a bill in chancery, answer, or other pleadings should contain without setting them out in *hæc verba*. The manner of the reading of the questions to the jury, with the rhetorical manner of their being read, is sufficient to show that they were intended for the jury, rather than questions for the lawyers. The rise and fall and pitch

of the voice, and the flourish of the right hand, right in the presence of the jury, is sufficient to exclude them, if there were nothing else; that the questions are not proper to be put to any witness, and especially to this witness; that the questions are, and each of them is, irrelevant, immaterial, improper, and incompetent, and for each and every one of these reasons ought to be excluded; that a large portion of the questions are based upon assumptions contrary to the facts.

The Court thereupon, in the presence of the jury, gave his decision substantially as follows:

The jury will be told, in the charge of the Court, that they are to take the facts as proven by the witnesses, and not as stated in the hypothetical questions. And, therefore, I do not think that any injury can accrue to the defendant from the elaborate statements of fact in the hypothetical, questions, or the manner of the counsel in reading them. They are merely a method of telling the witness what the plaintiffs claim to have done, and then asking the witness' opinion of the value of the services so claimed to have been done. But the jury will be told, in the charge of the Court, that they must ascertain what the plaintiffs have done, and ascertain it from the evidence, and not from the statements in these hypothetical questions, or in the arguments of counsel.

Said objections, and each and every of them, being thus overruled by the Court, counsel for defendants then and there duly excepted.

Thereupon this witnessed answered: I have heard, perhaps, three-quarters of hypothetical question No. 1 read; have skimmed over the balance at my office;

have heard read hypothetical questions 2, 3, 4, and 5. I have not divided the services; have lumped all the services embraced in the five statements or questions.

By the Court:

The witness having read the first statement and listened to the reading of the others can, if he chooses, give his opinion as to the value of all the services, without dividing it.

The witness then said: In answering this question, without having personal knowledge of the facts, I assume that the facts embraced in these hypothetical questions are true. Shortening them, I assume this to be true: That Mrs. Forsyth was the owner of about 8,000 acres of land southeast of the city, upon which there was a mortgage of $163,000, with interest added, and other claims added, which was in process of foreclosure when these plaintiffs were retained, and one of their duties was to defend and stave off and get time on the mortgage until something could be done with the land.

I assume also that Mr. Forsyth—the title of the land being in Mrs. Forsyth—had executed a power of attorney to some man in England to sell this land, and Mrs. Forsyth had written a letter saying, in substance, that she stood up to her husband, and a pretended sale had been made under that power of attorney, which was brought in as a cloud on this title. I assume also that the parties in interest had made a contract with some gentleman to sell this land, and were to give him $50,000 commissions out of the proceeds of the sale, and, as they went along in the negotiation, the services of that man

proved to be useless, and yet he was in a condition that he might get the money; that under the circumstances the plaintiffs here defended the suit on the mortgage, staved it off, getting time while they could negotiate a a sale of the land that there was some complication in regard to the sale of the land at first by the contract, but the end of it was that with the cloud made by the Englishman standing for it and the mortgage existing and not disposed of, they succeeded in making negotiations for a sale of this land by which the plaintiffs got $333,333 and a mortgage on the land for all the balance of *his* money, and that out of this enough was taken to put up in Court, so that they could file a cross-bill, or bill to redeem, and reduce this mortgage down to its legal amount and that these parties succeeded in fighting off the Englishman, broke him down, and they, by negotiations, succeeded in reducing the amount of the claim for $50,000 far selling the land to $10,000, and that under these circumstances they perfected this sale for a million dollars for the land, and got actually in cash $333,333, and got a mortgage for the balance of it—a mortgage on the land for all the balance—making a million dollars altogether.

Now, I would rather not say what I think that service is worth, but say I think it is worth, at least, $50,000. And the reason I say it is this: I believe about fees, generally, they ought to be regulated by contract; and as I have heard this, I have thought over in my mind, situated as Mr. and Mrs. Forsyth at the time were, supposing these plaintiffs had said to them: "I will stave off this mortgage until I can effect a sale

for a million dollars. I will get $333,333 in money, and security upon the lands for the back payments. I will break down this Englishman. I will reduce the $50,000 down to $10,000." I assume that if that was said to Forsyth that he would have said: "If you will do that I will give you much more than $50,000." I believe if these parties had said this, and then had said to Mrs. Forsyth: "What will you give me for it?" that she would have fixed a price very much larger than $50,000.

Counsel for defendant objected; that it was not competent for the witness to make such a statement to the jury, and that such statements of the witness were incompetent. Objection overruled by the Court, upon the ground, then stated in the presence of the jury, that it was admissible like any other reason which an expert gives to be weighed by the jury, to which ruling counsel for defendant duly excepted.

Witness coutinuing: Now, in the absence of any special contract, so far as I know, on negotiations of this character, I consider that sum entirely within the bounds of reason under the circumstances of the case. Now, I ought to state that I consider, from the circumstances of the case, there was great danger that Mr. Forsyth would lose this land altogether by this mortgage. It would be swept away from him, for this mortgage that was outstanding there was great danger that the complications with this Englishman might deter anybody from buying the land with that cloud upon it until the mortgage would just take it and eat it all up. I can say no further than that I consider that is a very reasonable sum. I think I am acquainted with the customary

and usual charges for legal services and in litigations of this kind. I have known one larger negotiation, never but one as large, complicated, intricate and successful as this one.

Robert Hervey testified: Practiced law forty years; in Chicago thirty years; have been present during most of the trial. I have read, or heard read, the five hypothetical questions in this case. I have heard all the testimony of James R. Doolittle, Jr., in regard to the services rendered. I am requainted with the usual and customary fees for services of the character described in the testimony and in the hypothetical questions. (Being the same as referred to and shown in the testimony of Leonard Swett.

Question by plaintiffs' counsel: What, in your judgment, were the services rendered reasonably worth?

Objection by counsel for defendant to the witness testifying from what he had heard of the testimony, and the same objections as above set out to the five hypothetical questions propounded to Leonard Swett, and also objection to this witness' answer to the same. Objections overruled, to which ruling counsel for defendant then and there duly excepted.

The witness: I should say that the services which I have heard detailed by Mr. Doolittle, Jr., on the witness stand, in conducting the negotiations culminating in this large sale to Mr. Ord, meeting the objections which Mr. Doolittle had to meet, overcoming them, details of which I have heard *in extenso*, which, to my mind, were of a very formidable character as affecting his client—I al ude particularly to one service of Mr. Doolittle, in

eliminating from the contracts, as proposed by Mr. Ord, that Mrs. Forsyth should take payment of the large amount of the deferred payments, two-thirds of a million of dollars in bonds of a company to be formed, at par, without any limitation as to the amount of the bonds to be issued by that company, the value of which would, of course, depend upon the amount of bonds to be issued, and although secured upon the land, if issued in any very large volume, would be, in my opinion, of comparatively small value—might be, according to the amount issued, from ten to fifty cents on the dollar—Mrs. Forsyth being obliged by that contract to take it, whatever amount was issued, at par, securing the elimination from the contract as proposed by Ord, of the right, in case of failure, to pay the two-thirds of a million by reconveying an undivided two-thirds interest in the lands, which I should have considered of a disastrous tendency towards Mrs. Forsyth; the securing payment of $10,000 interest for the extension of sixty days, an extension which I gather from the testimony, Mr. and Mrs. Forsyth would have been very glad to have granted on any terms, inasmuch as there seems to me to have been an absolute necessity on their part that this contract should have been carried out in view of the complications attending the title, viz,, this foreclosure proceeding for a very large amount, and this attack upon the title by these London parties; in reducing the Horne contract, which was an absolute engagement, I understand, on the part of Mrs. Forsyth to pay Horne $50,000 for certain services which he agreed to render, or was to render, reducing that from $50,000 to $10,000; in obtaining Mr. Doolittle's construction of

the proper amount to be paid as interest on the first payments maturing, as I remember, on the 1st day of January, 1882, if I mistake not, of some $3,200 more than Mr. Mason's theory claimed would be due, I should say that for these services, including the defense of the Tremearne suit and the ultimate disposition of the Tremearne suit, that five per cent. on the full amount of the purchase-money would, in my opinion, be not an unreasonable compensation.

Erastus S. Williams testified:

I have been, either on the bench or a practicing lawyer, for about forty years in Chicago. Have read or heard read the five hypothetical questions in this case. (Said questions or statements being the same as shown in the testimony of Leonard Swett.) I can say I am acquainted with the reasonable and customary charges for such services as are described therein.

Plaintiffs' counsel then asked witness to state what, in his judgment, the services named in these hypothetical questions were reasonably worth, taking them question by question or together, as he chose, assuming, as stated in the hypotheses, that these are the facts.

Same objections by counsel for defendant to the hypothetical questions as heretofore set forth in the objections to the hypothetical questions propounded to Leonard Swett; also objection to the answer of this witness thereto. Objections overruled; to which ruling of the Court counsel for defendant then and there duly excepted.

Witness: Assuming the facts to be true as they are stated in the hypothetical questions, I have an idea of

the value of the services. I ought to say, however, in explanation, that I cannot separate the different portions of the services. To me it seems to have been one whole thing, resulting, according to the hypothesis, in a certain highly beneficial result, as I will say, to the defendants. Supposing that hypothesis to be correct, the services must have taken up a very considerable time, and so far as I can see from the hypothetical questions, they seem to have been rendered with great fidelity and with great discretion in the main. In fact I do not think of anything that I see where it seems to me as if there was any blunder committed. As I understand, it is claimed on the part of the plaintiffs that, by virtue of the labor which was performed by them and the advice which they gave to their clients, the property, the 8,000 acres in Indiana, which had been covered by mortgage, and which mortgages were about to be foreclosed and were in process of foreclosure, was released entirely from the incumbrance; the incumbrance was all paid up; the property was sold for one million dollars, three hundred and thirty-three thousand three hundred and thirty-three dollars and thirty-three cents of which was obtained in cash, and nearly $40,000 or more of interest, which was obtained. There was demand, which was made by Horne, which seemed to have been recognized as a valid one by Mr. Forsyth, which was reduced from $50,000 to $10,000. There was a very large amount of usurious interest, between $25,000 and $30,000, thrown off as a result of the litigation. Taking in view all these facts, I think the services were well worth $50,000. I would say it was an exceedingly moderate charge, in

view of the character of the services and the result, as set forth in the hypothetical questions.

James Goggin testified:

Practiced law sixteen years. Have read hypothetical question No. 1 and heard all the others read, except No. 5, about drawing of the mortgage. I heard that testified to by Mr. Doolittle on the stand. I am acquainted with the usual and customary charges for services of the kind named in the hypothetical questions.

The witness was then asked by the counsel for the plaintiffs to state his opinion as to the value of the services as stated and described, taken together or separately.

Counsel for defendant objected to the questions for same reasons heretofore given and set forth in objections to the hypothetical questions propounded to Leonard Swett, and also objected to this witness' answer to said questions, and also objected to the witness testifying from what he has heard of the testimony in this case. Objections overruled by the Court; to which ruling counsel for defendant then and there duly excepted.

Witness: It is almost impossible for me to separate the questions, for the reason that the object of the whole litigation was the consummation of one great result. And I must assume, first, that the legal services, and the business ability, and the legal tact were combined and united to bring about the results that arose from the litigation; not only from the litigation, but from the business negotiation. I have estimated five per cent. on a million dollars to be a reasonable compensation for carrying through the negotiations.

Now, as to legal fees, the fees in setting aside the Horne contract or reducing the contract for the payment of commissions to Horne, that I would not estimate at a greater sum than $10,000. I think it is worth that. Defending in the foreclosure suit of the Pierson mortgage, that, perhaps, would be $2,500; that is, taking into consideration in that case not only the actual litigation and the necessary caution that had to be taken, but in defending a suit of that kind, in procuring the information in the East that tended to show that the notes had never been assigned, and, I infer from the evidence, led to the dismissal of the foreclosure suit. I think $2,500 or $3,000 would be a very fair and reasonable compensation for that. In filing the bill to redeem and up to the end when they were discharged, I think about $2,000; drawing the mortgage, $500; defense of the Tremearne suit, $1,500 to $2,000. Heard the testimony in regard to claims against Mrs. Forsyth in the guarantee of notes, $12,000; I think $100 to $150 reasonable for that.

Witness, on cross-examination, was asked by the defendants' counsel to assume that the deed from Mr. and Mrs. Forsyth to Mr. Green contains this clause, together with "the accretions, water, lake bed rights and the reversions," and assuming that in the mortgage back the words "accretions, water and lake bed rights" were omitted, and that these accretions, water and lake bed rights were of the value of $25,000, and then what would you say?

The witness answered: Now, let me say that in making my estimate as to the value, having read the ex-

hibits, it would not make a great deal of difference in the value of the services in a transaction of this magnitude.

It appeared in the evidence that the deed and mortgage were dated, executed, delivered and recorded at the same time, between the same parties, as one transaction.

William C. Grant testified:

Practiced law in Chicago about twenty-six years. I was of counsel for the Continental Life Insurance Company, which filed the bill to foreclose against Mr. and Mrs. Forsyth, and of counsel in the defense against the bill to redeem filed by them. I have examined hypothetical questions Nos. 1, 2 and 3. (Said questions being the same as shown in the testimony of Leonard Swett, Nos. 1, 2 and 3.) I am acquainted with the usual and customary charges in such cases.

The plaintiffs' counsel then asked the witness: Assuming the facts to be as stated in those three questions, what, in your judgment, would be a reasonable charge or reasonable charges to be made by the plaintiffs against the defendants? In other words, what were those services reasonably worth? You can take the questions separately or together, as you choose.

Counsel for defendant objected for the reasons stated in the objections to the hypothetical questions in the examination of Leonard Swett, and also objected to witness' answer thereto.

Objections overruled; to which ruling counsel for defendant then and there duly excepted.

Witness: Assuming the facts as stated in the three

questions, my judgment is that in the foreclosure and bill to redeem a charge of $5,000 would be very reasonable. Assuming the facts stated in the hypothetical question No. 2, it appeared that the services, as stated in the question, were performed in the matter of the removal of the Horne contract, or the reduction of the commissions in that case from $50,000 to $10,000. That would be worth at least $10,000. I should say that 25 per cent. in such a matter would be reasonable; 25 per cent. of the amount saved. And in the other matter of the sale of a large amount of property for a million dollars, securing one-third of that amount to be paid in cash, under the peculiar circumstances of the case, that ought to be worth from $25,000 to $40,000.

Thomas Hoyne testified:

Practiced law in Chicago since 1839; have read over hypothetical questions 1 and 2. I am ordinarily acquainted with the usual and customary charges for services of the kind described in the questions.

Thereupon the witness was asked to state what, in his judgment, the services set forth in the hypothetical statements 1 and 2 were reasonably worth.

Counsel for the defendant objected to the questions, for reasons given in the objections to the hypothetical questions in the examination of Mr. Swett, and also objected to witness' answer thereto. Objections overruled by the Court; to which ruling counsel for defendant then and there duly excepted.

Witness: I would say, judging in that case from the character of the professional men engaged, their long experience and position, from the very large amount

of money involved in the land in controversy, and from considering the services in the two-fold character of legal as well as a land negotiation or agency, I should say that the services were worth from $40,000 to $50,-000. I should say that, judging from the circumstances as they are, assuming them, of course, to be true and as stated in these two statements.

Henry S. Monroe testified:

Practiced law in Chicago about twenty-five years; have read hypothetical questions Nos. 1, 2, 3, 4 and 5 in this case. (Said questions being the same as shown in the testimony of Leonard Swett.) Am acquainted with the usual and customary charges for services of the character described in them.

The witness was then asked to state what, in his judgment, the services were reasonably worth, taking them together or separately.

The counsel for the defendant objected to the questions and to the answer of the witness, for the same reasons as before stated in the objections to the hypothetical questions in the testimony of Leonard Swett. Objections overruled by the Court; to which ruling counsel for defendant then and there duly excepted.

Witness: Part of the services that were rendered as described in the hypothetical questions were perhaps unusual to a general practitioner, but I have an idea of them; taking all the services rendered as detailed in all those hypothetical questions $50,000 would be very reasonable. $60,000 would not be excessive.

The answers of the witnesses, Leonard Swett, Robert Harvey, Erastus S. Williams, James Goggin, William C. Grant, Thomas Hoyne, Henry S. Mon-

roe, and William C. Gulliver, respectively, to the said hypothetical questions propounded by plaintiffs' counsel were severally duly objected to by counsel for defendant, and the objections were each and all overruled by the Court, to which ruling of the Court counsel for defendant then and there duly excepted.

Sixth. The verdict of the jury is not warranted or sustained by the evidence.

Seventh. The verdict of the jury is contrary to the law and the evidence in the case.

Eighth. The damages awarded by the verdict of the jury are grossly excessive, exorbitant and unjust.

Ninth. The jury was, manifestly, unduly prejudiced against the defendant.

Tenth. Melville W. Fuller, the leading counsel for the plaintiffs on the trial of this case, was a jury commissioner to select jurors for this Court, and who selected one-half of the jurors whose names were placed in the box from which the jurors before whom this case was tried were drawn, and a portion of the jurors before whom this ease was tried were so selected by said Fuller. And neither the said defendant nor her counsel knew that said Fuller was such jury commissioner, or selected any jurors for this Court, until more than a week after the rendition of the verdict in this case.

Eleventh. For divers and sundry errors appearing in the record and proceedings the verdict of the jury should be set aside and a new trial granted.

Respectfully submitted,

JOSEPH E. MCDONALD,
JOHN M. BUTLER,
Of Counsel for Plaintiff in Error.

120-76

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No. 107.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1886.

JAMES R. DOOLITTLE, JAMES R. DOOLITTLE, JR. AND HENRY McKEY,
Defendants in Error,

ads.

CAROLINE M. FORSYTH, IMPLEADED WITH JACOB FORSYTH,
Plaintiff in Error.

PHILADELPHIA BAR ASSOCIATION

BRIEF OF DEFENDANTS IN ERROR.

J. R. DOOLITTLE,
J. R. DOOLITTLE, JR.,
PRO SESE.

M. W. FULLER,
OF COUNSEL.

BARNARD & GUNTHORP, LAW PRINTERS, 44 & 46 LASALLE ST., CHICAGO

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Plaintiff in Error.

BRIEF OF DEFENDANTS IN ERROR.

IF THE COURT PLEASE:

The brief of the plaintiff in error in statement of the case, specifications of error and argument, is meager, and cannot convey to the mind of the court even an outline of the subject matter of the litigation. In the statement of the case and the specifications of error, it does not, in our opinion, meet the requirements of the rules of this court.

We therefore submit the following:

Statement.

This suit was brought by the defendants in error against the plaintiff in error, impleaded with Jacob Forsyth upon a joint liability, to recover the value of services rendered the plaintiff in error and Jacob Forsyth, from about April 1, 1881, to January 1, 1882.

The services were rendered in and about forty-one different subjects, some of which will be briefly referred to.

Plaintiff in error was, and had been for several years, the owner of about 8,000 acres of land in the northwest part of Indiana, about sixteen miles from Chicago, of which about one thousand acres were fit for agricultural purposes. Its uses and value were speculative to a great extent, in consequence of its proximity to Chicago, and the prospect of its possible use for commercial purposes as a suburb. The property was producing no revenue. Tax sales had been made, and a foreclosure suit was pending in the Federal court at Indianapolis to foreclose a trust deed for $163,000, given in 1875, to secure a loan for $100,000, without annual interest. The Forsyths had no means, except the tract of land, and could only pay the mortgage debt by effecting a sale. In a prior attempt to sell the estate to a London stock company, Forsyth and wife had signed certain writings which threatened to cloud the title and prevent a sale. A sale of the land was necessary in order to pay debts; and compensation for services to

be rendered in the labor incident to the business, was dependent upon a sale being made.

The declaration avers that:

"It was then and there, in consideration thereof, understood and agreed, by and between the said plaintiffs and the said defendants, to wit: on the first day of April, A. D. 1881, at Chicago, to wit: at the district aforesaid, that the compensation of the said plaintiffs in case said sale should be consummated, should be large, liberal and generous, and that the contingency of failure or success in the completion of said sale was then and there understood and agreed between the plaintiffs and defendants to enter into and form a material part of said contract of retainer and employment; and that, by reason of such contingency, the compensation of said plaintiffs for such services in case of the successful completion of said sale should be large, liberal and generous." (P. R., 7.)

The plaintiff in error filed a plea of the general issue to the declaration, as follows: (P. R., 3 and 4.)

"And the said defendant, Caroline M. Forsyth, by William H. King and Frederick W. Packard, her attorneys, comes and defends the wrong and injury when, etc., and says that she did not, together with said Jacob Forsyth, undertake or promise in manner and form as the said plaintiffs have above thereof complained against her and the said Jacob Forsyth, and of this she puts herself upon the country, etc."

The verdict found the issues for the defendants in error, upon an issue made by the plaintiff in error, upon the above plea of the general issue. Caroline M. Forsythe was the only party served. Her co-defendant, Jacob Forsyth did not appear.

Under the Conformity Act, the common law practice of the State of Illinois prevailed on the trial, and the pleadings admitted the joint liability of the two defendants below, by virtue of the provision of the Illinois statute, which is as follows: (Rev. Stat. of Illinois, chapter 110, section 36.)

"In actions on contracts, expressed or implied, against two or more defendants, as partners or joint obligors or payors, whether so alleged or not, proof of the joint liability or partnership of the de-

fendants, or their Christian or surnames, shall not in the first instance be required to entitle the plaintiff to judgment, unless such proof shall be rendered necessary by pleading in abatement, or unless the defendant shall file a plea in bar denying the partnership, or joint liability, or the execution of the instrument sued upon, verified by affidavit."

The trial was long, continuing from April 4 to May 2, 1883, when the verdict was rendered.

The evidence, introduced by the defendants in error, showed that the land was sold for a million dollars to Joseph P. Ord and his assigns, one-third in cash and a mortgage on the land for two-thirds of that sum; that the contracts in and about the sale were drawn by the defendants in error, and that the negotiations over their terms were conducted by them in a careful, skillful and able manner; and that under circumstances where failure was probable, success a contingency, and the necessities of their clients such as to tempt them to improvident engagements, and desperate expedients, the defendants in error supplied the business judgment, the legal knowledge, and the faithful, and patient service which carried the doubtful enterprise to a splendid success.

The defense against the mortgage was highly successful, for the defendants in error were enabled to so answer the bill, alleging usury, as to induce the complainants to dismiss their bill, and subsequently a bill to redeem was filed, and a tender of $210,000, a portion of the money received on the sale of the land, was made in court. (Pr. Rec., 131.) The defendants in error obtained and set out in the bill to redeem, such facts as rendered the defense of usury available as against the holders of the mortgage notes, and a reduction of about twenty-five thousand dollars, from the amount due by the face of the notes was secured. (P. R., 133.)

The Forsyths had made a contract with a party named Horne, agreeing to pay him $50,000 as a commission on the sale of the lands. At a point in the negotiations, the defendants in error secured a reduction of $40,000 in this contract. (See contracts. P. R., 80-83.)

In the matter of passing the titles of the land, a serious question was raised by the filing of a bill to compel a conveyance of the land to Tremearne, as trustee of the London stock concern, based on writings made by the Forsyths prior to the retainer of defendants in error.

This cloud was finally removed from the title, but the defendants in error were successful in prevailing upon the counsel of Mr. Ord, to accept the title and conclude the sale and pay the consideration, while the suit was pending and before it could be adjudicated upon; which service enabled the Forsyths to conclude the sale, and furnished the money for the redemption of the mortgage.

The defendants in error were likewise engaged, and rendered service, in over thirty-five other matters for the plaintiff in error and her husband, but they need not be specially referred to in this statement, except a brief allusion to the preparation of the mortgage for the security of the payment of two-thirds of a million dollars on the land conveyed, which was framed by defendants in error.

The contracts between the Forsyths and Mr. Ord provided that the mortgagor should not be personally liable for the indebtedness. The construction of such an instrument, so as to provide for proper notices of forfeiture, places and modes of payment, and other

points to insure the validity of the security and promptness in its enforcement, was considered of sufficient importance to induce defendants in error to submit the instrument to experts called on the trial on the question of the value of the services rendered.

Hypothetical statements were prepared by the defendants in error upon five of the subjects of employment, and were submitted to experts on the trial for their opinion as to value. Such statements are upon the following subjects in the order indicated:

No. 1. Negotiations and preparation of contracts of sale to Ord of the 8,000-acre tract.

No. 2. Reduction of Horne commission from $50,000 to $10,000.

No. 3. Litigation about the mortgage for $163,000 and other claims embraced in it.

No. 4. Defense of the title against the Tremearne, or London, suit.

No. 5. Preparation of the mortgage to secure the deferred payment of $666,666.66.

One expert witness, Robert Hervey, listened to and gave an opinion upon all of the testimony of the defendant in error, who testified to the services rendered by defendants in error, but no part of his testimony concerning the value of services, other than those embraced in the said five hypothetical statements, has been preserved in the bill of exceptions.

Only a part of the case is before this court.

Defendants in error are aware that the foregoing

statement is but a sketch of the main features of the evidence and the prominent elements of the services, but trust it is sufficient to render the application of what follows intelligible. The charge of the court, to be found on pp. 192 *et seq.* of the printed record, contains a careful statement of the case.

AUTHORITIES CITED IN THIS BRIEF.

Rev. Stat. of Illinois, Chapter 110, Sec. 36. (Set out in full at page 3, Brief of defendants in error.)
Burton v. *Driggs*, 20 Wall., 125.
Evanston v. *Gunn*, 99 U. S. Rep., S. C., 660.
Greenleaf's Ev., Vol. 1, Sec. 174.
Stephen's Dig. Law of Ev., Part 1, Chap. V., Art. 54.
Best on Evidence, Sec. 517.
Keith v. *Lothrop*, 10 Cush., 453.
Dickenson v. *Fitchburg*, 13 Gray, 546.
Gould v. *Day*, 94 U. S. Rep., S. C., 405.
United States v. *McMasters*, 4 Wall., 680.
Moore v. *Bank*, 13 Pet., 302.
Gilman v. *Town of Strafford*, 50 Vermont, 723.
State v. *Lautenschlager*, 22 Minn., 514.
Wright v. *Hardy*, 22 Wis., 348.
Haish v. *Payson*, 107 Ill., 365.

ARGUMENT.

In preparing an answer to the brief of plaintiff in error, we venture to entertain the belief that this court will not consider any of the points embraced in the specifications of error, as follows:

The sixth assignment, which avers that the verdict of the jury is not warranted by the evidence.

The seventh assignment, which avers that the verdict is contrary to the law and the evidence.

The eighth assignment, that the damages are excessive.

The ninth assignment, that the jury was unduly prejudiced.

Nor the tenth and eleventh assignments, which have not been referred to in the brief of plaintiff in error.

That the third assignment, as to the refusal of the court to charge the jury (*the instructions refused not having been set out in the brief*), will also be disregarded by the court.

That the fourth assignment, which alleges that the charge of the court, taken as a whole, was especially favorable to defendants in error (*neither the charge nor any part objected to being set out in the brief*), will also be disregarded by the court.

That the fifth assignment of error, which alleges error in allowing certain hypothetical questions to be read to experts in the presence of the jury, will be disregarded by the court, because the objections urged in the court below are nowhere set out in the brief; and

That the second assignment of error will be disregarded, because the evidence offered by plaintiff in error, and excluded by the court, *is nowhere set out in the brief.*

In regard to the remaining assignment or specification of error, the first assignment of error, which avers that the court erred in admitting incompetent, irrelevant and immaterial testimony, we venture to believe that this court will, under no circumstances, permit an argument of any points not clearly made in the brief of plaintiff in error, and by a noticeable reference to the testimony.

Those points, as we are advised on an inspection of said brief, are the following:

I. A. J. Averill's testimony, page 6 of brief.

II. J. B. Chandler's testimony, page 7 of brief.

III. Isaac N. Hardin's testimony, page 7 of brief.

IV. W. C. Gulliver's testimony, pages 12 and 13 of brief.

V. Leonard Swett's testimony, pages 16 and 17 of brief.

VI. Robert Hervey's testimony, pages 20 and 21 of brief.

VII. Erastus S. Williams' testimony, page 23 of brief.

VIII. James Goggin's testimony, page 24 of brief.

IX. W. C. Grant's testimony, pages 24 and 25 of brief.

X. Thomas Hoyne's testimony, page 25 of brief.

XI. Henry S. Monroe's testimony, page 25 of brief.

In making a statement of the testimony of these wit-

nesses, we will set out parts of it more fully than is done in the brief of plaintiff in error, and will refer to the objections as stated in the record, which have not been set out in the statement or assignment of error in the brief of plaintiff in error.

XII. While the brief of plaintiff in error has not set out the objections to the hypothetical questions, and for this reason, we contend that those objections are waived, we will notice so much of the *general indictment* of the questions as is contained on pages 26 and 27 of brief of plaintiff in error.

POINTS.

I.

A. J. AVERILL'S TESTIMONY,

The court did not err in admitting the testimony of A. J. Averill, describing the general character and uses to which the land is adapted. The reason given by the judge for admitting it is well stated in his charge, as follows:

"The value of the land is immaterial to the questions in this case, but I was of opinion, and am so still, that the character of the land and the uses to which it is adapted, or for which it is likely to find a purchaser, are elements which might, in some degree, aid you in passing upon the material facts, and therefore this proof was admitted." (P. R., 193.)

II AND III.

J. B. CHANDLER'S AND ISAAC N. HARDIN'S TESTIMONY.

We quote from the printed record (page 27) as follows:

"Joseph B. Chandler testified that he knew plaintiffs and Jacob Forsyth. That in November, 1881, after consummation of sale, he met Mr. Forsyth and Mr. Doolittle, Jr., and congratulated Forsyth upon his successful negotiation of his property, and that Forsyth, with a waive of the hand and a very graceful bow, turned to Mr. Doolittle and remarked that witness should congratulate Mr. Doolittle."

(Said conversation objected to by counsel for defendant as *immaterial.* Objection overruled and exception to such ruling by counsel for defendant.)

Isaac N. Hardin testified that he had conversation with Mr. Forsyth relative to the Weston option contract, after contract was given, and before Weston returned from New York. That Forsyth said he was fearful Weston would not carry out the arrangement, and that the

paper given Weston might complicate the land and perhaps prevent sale through other channels, and desired to make demand on Horne for return of the paper, or completion of the arrangement, and desired witness to go to Belt Line office and witness such demand; that other parties were trying to negotiate for purchase of the land, and he had kept them off in view of this matter with Weston, and asked advice of witness as to propriety of opening such negotiations; that one party desired a price to be set on the land, and that price was $600,000; that he would have to pay commission, and the amount realized would be considerably less than $600,000. He desired my advice. That witness advised him he had better sell for any substantial sum above the mortgage, and not to let the opportunity pass to get two or three hundred thousand dollars above the mortgage, and not to wait longer upon Weston. That after the sale took place, Forsyth said to witness, it had been his great good fortune in securing Judge Doolittle and his son as counsel; that giving character to the transaction, had aided largely the result of the sale.

(Counsel for defendants objected to the testimony of this witness, and moved to strike out the same as *immaterial*.. Which objection and motion was overruled; to which ruling counsel for defendants duly excepted.)"

1.

The only objection urged to the admission of the testimony of Chandler and Hardin on the trial, was that the same was "immaterial." (See P. R., 27.)

The point made in this court (Plff's brief, p. 8) admits the materiality of the evidence, but raises a new objection that Jacob Forsyth was *incompetent* to make an admission binding on Caroline M. Forsyth, after the conclusion of the transaction.

We submit that no such change of the ground of objection can be heard in this court.

The ground of objection to the admissibility of evidence, as urged on the trial, cannot be abandoned on appeal or error, and a different ground of objection urged in the appellate court for the first time.

This court have on numerous occasions announced the proper rule.

In *Burton* v. *Driggs*, 20 Wall., 125, at page 133, Mr. Justice SWAYNE in delivering the opinion, said: "It is a "rule of law that where a party excepts to the admis- "sion of testimony, he is bound to state his objection "specifically, and in a proceeding for error he is con- "fined to the objection so taken."

In *Evanston* v. *Gunn*, 99 U. S. Rep., S. C., 660, at page 665, Mr. Justice STRONG, in delivering the opinion, says: "The defendants having thus specified their objection, "it must be considered that all others were waived, or "that there was no ground upon which others could "stand."

2.

The declaration expressly alleged the joint retainer (see P. R., 6), and the jury found the issue for the plaintiffs below. (See P. R., 213.)

Admissions by one of several parties jointly interested in the subject matter in suit are evidence against all. The parties stand to each other, in this respect in a relation similar to that of existing partners.

Greenleaf Ev., Vol. 1, Sec. 174.

Such admissions are not evidence to establish the joint interest. But when the parties are shown to be jointly interested, the admission of one is the admission of all.

In this case, the plaintiff in error admits on the record, her joint liability with Jacob Forsyth, as alleged in the

declaration. (See Rev. St. Illinois, Chap. 110, Sec. 36, *ante*, page 3.)

She admits by her pleading that the services sued for, if any, were rendered to herself and her co-defendant jointly, and that both are jointly liable to pay for the same. Any admission made by her co-defendant touching the extent or nature of the services rendered under their joint retainer, is evidence against her.

It is immaterial to enter the field of conjecture, or of actual facts, to determine whether one or the other of the defendants below, received the greater benefit from such services, or whether a part of the services was rendered concerning property in which their respective interests differed.

It would be equally pertinent to inquire in regard to the respective abilities of the husband and the wife to pay what is jointly due from them.

Counsel for plaintiff in error would apparently limit her liability to services performed by defendants in error in relation to her individual property interests. The measure of her liability is the value of the services of defendants in error rendered upon the joint retainer of herself and Jacob Forsyth. In this action, the value of services rendered to the parties separately, could not be recovered.

The objections to the admission of the testimony of Chandler and Hardin were properly overruled by the court. And the argument of the counsel of plaintiff in error, on the subject of admissions by an agent does not apply to the case.

IV.

W. C. GULLIVER'S TESTIMONY.

The witness, Gulliver, deposed (P. R., 36) that the strictly legal services indicated in the question (hypothetical statement, No. 1) viz.: interpretation of the various contracts, drawing of the contracts, and advice as to their legal effect, was worth $5,000; that, as witness understood the facts set forth in the question, plaintiff's services were, to a large extent, extra-professional—that of negotiators—by which defendants seemed to have been saved a considerable sum of money, and for these services, as distinguished from the strictly legal services, I should regard a proper compensation about $40,000.

(P. R., 36): "Witness was asked by plaintiff's counsel the following question: Has your experience in the matter of negotiations of contracts, involving amounts of a quarter of a million, and upwards, been such that you can state an opinion in regard to the value of services in the matter of negotiating contracts of that character?

(Objected to by defendant's counsel as immaterial and incompetent.)

The COURT to the reporter: Put it down that Mr. King objects to every question, and let him have an exception.

Mr. KING: An exception to everything?

The COURT: Yes.

The witness answered, yes."

1.

The witness was giving his opinion of the value of the services of the defendants in error. The question objected to, which immediately follows such testimony, was one of a series of preliminary questions asked the witness for the purpose of testing his competency as an expert, and the exception to the ruling is preserved, apparently for the purpose of placing in the record the alleged impatience displayed by the court in disposing of the objection.

On this point it is only fair to the court to say, that the bill of exceptions does not purport to include all of

the objections made and exceptions taken by the counsel for the plaintiff in error on the trial, but only such as he saw fit to preserve.

2.

One ground of objection (urged in the argument of plaintiff in error) to the testimony of the witness, Gulliver, testifying as an expert on the question of value, is the reason given by him in support of his opinion, that the plaintiff in error *seemed to have been saved a considable sum of money by the services of defendants in error as negotiators.* And it is urged with great pertinacity by counsel for plaintiff in error, in their brief, that the witness ought not to have entertained or expressed such an opinion.

Without asserting or denying the correctness or validity of the reason given by the witness, we maintain that the court was right in allowing it to go to the jury.

The testimony of the witness was his estimate of the value of the services rendered, as stated in hypothetical statement No. 1, which he placed at $45,000. His reasons for entertaining that opinion were only important, as they might enable the jury to determine whether his opinion was worth anything. If an expert gives a wrong reason, it is presumed to impair the value of his opinion, in the minds of the jury, who know the evidence, and try all issues of facts in the case.

His reason, given in support of his opinion, does not prove the correctness of the reason he gives, and that reason is not evidence of its own truth. Mr. Gulliver's

reason, stated as an expert, that the services seemed to have saved the plaintiff in error a large sum of money, did not prove it, nor was it evidence tending to establish that fact.

The ruling of the court in permitting Mr. Gulliver to give the reason for his opinion, does not hold that his reason was either a good one or a bad one, nor commits the court to the correctness of it. It is not a charge to the jury, stating that the reason in the mind of the expert is, in the judgment of the court, either true or false, or that it is good or bad in law.

3.

An expert may give the reasons for his opinion. This proposition of law is elementary.

"Whenever the opinion of any living person is deemed to be relevant, the grounds on which such opinion is based are also deemed to be relevant."

Stephen's Dig. Law of Ev., Part 1, Chap. V., Art. 54.

"In all cases, of course, the grounds on which the judgment of the witness is formed, may be inquired into on cross-examination."

Best on Ev., Sec. 517.

The Supreme Judicial Court of Massachusetts, in *Keith* v. *Lothrop*, 10 Cush., 453, at page 457, says:

"The witness Smith, who was called as an expert, was rightly allowed to give the reasons for the opinion that he expressed."

"The value of an opinion may be much increased or diminished, in the estimate of the jury, by the reasons given for it."

Chief Justice SHAW, in *Dickenson* v. *Fitchburg*, 13 Gray, 546, at page 556, has stated the rule and the reason of it, better than we have seen it given elsewhere:

"It appears to the court that the witness should be permitted to explain the grounds and reasons of his opinion to the court and jury; they may readily perceive the force of his reasoning, the soundness or fallacy of his logic, and therefore judge of his capacity to give an opinion on the subject, and the correctness of his conclusions, and consequently the weight due to his opinion.

"But it is objected that the admission of this evidence would open the door to evidence entirely incompetent, by allowing the witness to state the facts on which the opinion is founded, facts not proved by competent evidence.

This objection seems to us to be founded on a misconception of the manner in which the investigation is to be conducted, and the testimony of experts received and applied. *It assumes that the facts will be taken to be true, because the witness has stated that he founds his opinion upon them.* But this is quite a mistake."

Again, at page 557, the same learned judge says:

"But the consideration submitted in the argument in opposition to this view, namely: that the opinion may be given on the assumption of facts not proved, is a strong additional reason why the grounds and reasons of the opinion should be stated, in order that the jury may see that it is not founded on hearsay, general rumor, or facts of which some evidence may have been given, but, being controlled by other evidence, are not found true by the jury. This inquiry has been more frequently made in cross-examination, yet we are of opinion that it is competent evidence in chief."

Now, applying these principles to the case in hand, what follows:

1. Either party is entitled to have the expert give the reasons for his opinion, either in cross-examination, or in chief.

2. The reasons given by the expert in support of his opinion are not evidence of facts in the case, but tend to show the ability and knowledge of the witness and the value of his judgment, and go to fix the degree of credit which the jury shall attach to his opinion, which is evidence in the case.

3. Such reasons, whether sound or unsound, are to be weighed by the jury, whose province it is to decide

all questions of fact submitted to them, and the credibility of witnesses.

4. It is, at least, doubtful whether the court could exclude from the consideration of the jury an erroneous reason given by an expert in support of his opinion, for it might have the effect of giving to the opinion of the witness more weight than the jury would otherwise attach to it. The court is not an expert, and has no authority to weigh, or pass upon, the sufficiency of the reasons, given by an expert before the jury in support of his opinion.

5. If an expert has given, in support of his opinion, a reason based on an unsound view of the law, the court, if necessary, on request of either party, will charge the jury as to the law of the case. The expert, in testifying, does not instruct the jury on the law of the case, any more than counsel do in their arguments.

In the argument in the brief of plaintiff in error, at page 25, counsel for plaintiff comment, in a deprecatory tone, on the ruling of the court below, admitting the reasons of experts to be weighed by the jury. These reasons so admitted, are styled in the brief "arguments."

The ruling of the court was right; it is sustained by good authority, and is unquestioned by any authority.

Insert at page 19, Brief Defts. in Error, before V.

Lewiston Steam Mill Co. v. *Androscoggin Water Power Co.* Decision Supreme Court of Maine, filed June 7, 1886, 4 Atlantic Reporter, p. 555.

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The ruling of the court was right; it is sustained by good authority, and is unquestioned by any authority.

V.

LEONARD SWETT'S TESTIMONY.

P. R., 185: "The witness then said: In answering this question, without having personal knowledge of the facts, I assume that the facts embraced in these hypothetical questions are true. Shortening them, I assume this to be true: That Mrs. Forsyth was the owner of about 8,000 acres of land south-east of the city, upon which there

was a mortgage of $163,000, with interest added, and other claims added, which was in process of foreclosure when these plaintiffs were retained, and one of their duties was to defend and stave off and get time on the mortgage, until something could be done with the land.

I assume also that Mr. Forsyth—the title of the land being in Mrs. Forsyth—had executed a power of attorney to some man in England to sell this land, and Mrs. Forsyth had written a letter saying, in substance, that she stood up to her husband, and a pretended sale had been made under that power of attorney, which was brought in as a cloud on this title. I assume also that the parties in interest had made a contract with some gentleman to sell this land, and were to give him $50,000 commissions out of the proceeds of the sale, and as they went along in the negotiation, the services of that man proved to be useless, and yet he was in a condition that he might get the money; that under the circumstances, the plaintiffs here defended the suit on the mortgage, staved it off, getting time while they could negotiate a sale of the land; that there was some complication in regard to the sale of the land at first by the contract, but the end of it was, that with the cloud made by the Englishman standing over it, and the mortgage existing and undisposed of, they succeeded in making negotiations for a sale of this land, by which the plaintiffs got $333,333 and a mortgage on the land for all the balance of his money, and that out of this enough was taken to put up in court, so that they could file a cross-bill or bill to redeem, and reduce this mortgage down to its legal amount; and that these parties succeeded in fighting off the Englishman, broke him down, and they, by negotiations, succeeded in reducing the amount of the claim for $50,000 for selling the land to $10,000, and that under these circumstances they perfected this sale for a million of dollars for the land, and got actually in cash $333,333, and got a mortgage for the balance of it—a mortgage on the land for all the balance—making a million dollars altogether.

Now, I would rather not say what I think that service is worth, but say I think it is worth, at least, $50,000. And the reason I say it is this: I believe about fees, generally, they ought to be regulated by contract; and as I have heard this, I have thought over in my mind, situated as Mr. and Mrs. Forsyth at the time were, supposing these plaintiffs had said to them: 'I will stave off this mortgage, until I can effect a sale for a million dollars. I will get $333,333 in money and security upon the lands for the back payments. I will break down this Englishman. I will reduce the $50,000 down to $10,000.' I assume that if that was said to Forsyth that he would have said: 'If you will do that, I will give you much more than $50,000.' I believe if these parties had said this, and then had said to Mrs. Forsyth: 'What will you give me for it?' that she would have fixed a price very much larger than $50,000.

Counsel for defendant objected; that it was not competent for the witness to make such a statement to the jury, and that such statements of the witness were incompetent, Objection overruled by the court,

upon the ground, then stated in the presence of the jury, that it was admissible, like any other reason which an expert gives, to be weighed by the jury, to which ruling counsel for defendant duly excepted.

Witness continuing: Now, in the absence of any special contract, so far as I know, on negotiations of this character, I consider that sum entirely within the bounds of reason, under the circumstances of the case. Now, I ought to state that I consider, from the circumstances of the case, there was great danger that Mr. Forsyth would lose this land altogether by this mortgage. It would be swept away from him, for this mortgage that was outstanding, there was great danger that the complications with this Englishman might deter anybody from buying the land with that cloud upon it, until the mortgage would just take it and eat it all up. I can say no further than that I consider that it is a very reasonable sum. I think I am acquainted with the customary and usual charges for legal services and in litigations of this kind. I have known one larger negotiation, never but one as large, complicated, intricate and successful as this one."

1.

The objection to the testimony of this witness alleged in the brief of plaintiff in error, is that he was permitted to give a synopsis of the hypothesis upon which he was to base his opinion as to value.

That the witness had in mind the benefits which plaintiff in error received from the services of defendants in error, rather than the value of the services. (Brief, p. 19). And that the expert stated a reason for his opinion, that fees ought to be regulated by contract.

None of the objections were valid, and were properly overruled.

The same authorities apply to the objection to this testimony, as those cited under point IV.

2.

But were the law of evidence otherwise, no error has been committed.

The testimony of the witness covered many statements, and the particular statement objected to was not specified. The objection applies as well to the opinion of value given by the witness, as to the reasons urged in support of the opinion.

The objection should specify the portion of the testimony objected to, but it was general to the whole testimony given.

If a question addressed to a witness is unobjectionable, and the answer goes beyond what is called for, and gives improper or incompetent testimony, the objection to the question will not extend to the answer. Special objection must be taken, in such case, to the answer.

Gould v. *Day*, 94 U. S. Rep., S. C., 405.

"It is the duty of the party excepting to evidence, to point out the part excepted to, so that the attention of the court may be drawn to it. *If the exception covers any admissible evidence it is rightly overruled.*"

United States v. *McMasters*, 4 Wall., 630.
(Quotation from p. 682.)
Moore v. *Bank*, 13 Pet., 302.

VI.

ROBERT HERVEY'S TESTIMONY.

(P. R., 186.) "Practiced law forty years; in Chicago thirty years; have been present during most of the trial. I have read, or heard read, the five hypothetical questions in this case. I have heard all the testimony of James R. Doolittle, Jr., in regard to the services rendered. I am acquainted with the usual and customary fees for services of the character described in the testimony and in the hypothetical questions." (Being the same as referred to in the testimony of Leonard Swett.)

"Question by plaintiffs' counsel: What, in your judgment, were the services rendered reasonably worth?"

(Objection by counsel for defendant to the witness testifying from what he had heard of the testimony, and the same objections as above set out to the five hypothetical questions, in the objections to the hypothetical questions propounded to Leonard Swett, and also objection to this witness' answer to the same. Objections overruled; to which ruling counsel for defendant then and there duly excepted.)

The witness: *I should say that the services which I have heard detailed by Mr. Doolittle, Jr., on the witness stand,* in conducting the negotiations culminating in this large sale to Mr. Ord, meeting the objections which Mr. Doolittle had to meet, overcoming them, details of which I have heard *in extenso,* which, to my mind, were of a very formidable character as affecting his client—I allude particularly to one service of Mr. Doolittle, in eliminating from the contracts as proposed by Mr. Ord, that Mrs. Forsyth should take payment of the large amount of the deferred payments, two-thirds of a million of dollars in bonds of a company to be formed, at par, without any limitation as to the amount of the bonds to be issued by that company, the value of which would, of course, depend upon the amount of bonds to be issued, and although secured upon the land, if issued in a very large volume, would be, in my opinion, of comparatively small value—might be, according to the amount issued, from ten to fifty cents on the dollar—Mrs. Forsyth being obliged by that contract to take it, whatever amount was issued, at par; securing the elimination from the contract as proposed by Ord, of the right, in case of failure to pay the two-thirds of a million, by reconveying an undivided two-thirds interest in the lands; which I should have considered of a disastrous tendency towards Mrs. Forsyth; the securing payment of $10,000 interest for the extension of sixty days, an extension which I gather from the testimony, Mr. and Mrs. Forsyth would have been very glad to have granted on any terms, inasmuch as there seems to me to have been an absolute necessity on their part that this contract

should have been carried out in view of the complications attending the title, viz.: this foreclosure proceeding for a very large amount, and this attack upon the title by these London parties; in reducing the Horne contract, which was an absolute engagement, I understand, on the part of Mrs. Forsyth to pay Horne $50,000 for certain services which he agreed to render, or was to render, reducing that from $50,000 to $10,000; in obtaining Mr. Doolittle's construction of the proper amount to be paid as interest on the first payments maturing, as I remember, on the first day of January, 1882, if I mistake not, of some $3,200 more than Mr. Mason's theory claimed would be due: I should say that for these services, including the defense of the Tremearne suit, and the ultimate disposition of the Tremearne suit, that five per cent. on the full amount of the purchase money would, in my opinion, be not an unreasonable compensation."

1.

In connection with the testimony of this witness, as it is contained in the record, it is proper to state that the brief of plaintiff in error misstates the record, where it assumes to cast a doubt over the identity of the hypothesis submitted to Mr. Hervey. On page 22 of the brief, are these words:

"It is certainly not possible to determine how much of that evidence is influenced by the hypothetical cases, or how much is affected and controlled by the testimony of Doolittle to which he refers with such approval."

The learned counsel prepared that sentence, in the light of the testimony of Mr. Hervey, on page 186 of the printed record, which reads: "I should say that the ser-" vices which I heard detailed by Mr. Doolittle, Jr., *on* "*the witness stand*," etc.; and also, in the light of the charge of the court, in which, on page 208, printed record, are these words:

"It is proper, however, that I should in this connection call your attention to the fact that one of the plaintiffs' witnesses as to value, Mr. Hervey, testified that he had heard the testimony of Mr. J. R. Doolittle, Jr., and had given his estimate as to what was a fair and reason-

able charge for the services rendered from Mr. Doolittle's statement as to the nature and extent of such services, so that Mr. Hervey's estimate of the value of the services is based on the assumption that Mr. J. R. Doolittle, Jr., truly stated in his testimony the nature and amount of the services by the plaintiffs for the defendant. Mr. Hervey does not testify to you that the plaintiffs, in fact, rendered the services claimed, but only if it be true, as stated by Mr. Doolittle, Jr., in his testimony, that plaintiffs did render these services, then a reasonable value or compensation for them would be the amount stated by him."

2.

The witness, Hervey, could give his opinion upon the testimony which he had heard detailed on the trial by the defendant in error, without requiring the same to be propounded in the form of hypothetical questions.

In *Gilman* v. *Town of Strafford*, 50 Vermont, 723, the court at page 727, says:

"Where an expert hears or reads the evidence, there is no reason why he may not form as correct a judgment based upon such evidence, assuming it to be true, as if the same evidence was submitted to him in the form of hypothetical questions; and it would seem to be an idle and useless ceremony to require evidence with which he is already familiar to be repeated to him in that form."

The Supreme court of Minnesota, in *State* v. *Lautenschlager*, 22 Minn., 514, at page 521, says:

"In effect, therefore, the enquiry was predicated upon the hypothesis that the facts stated by the testimony referred to, and which the witness heard, were true, and was a convenient mode of stating a hypothetical case, permissible in the discretion of the court, within the rule laid down in *Getchell* v. *Hill*, 21 Minn., 464."

The Supreme court of Wisconsin, in *Wright* v. *Hardy* 22 Wis., 348, at page 355, says:

"It is manifest that it is but a matter of difference in the forms of putting the same question, neither of which can be said to possess any decided advantage over the other. The opinion of the adept upon the same supposed state of facts can be readily obtained by either. In the one, the statement of the witness is taken as a supposed case; in

the other the statement is repeated by counsel, or a case stated exactly corresponding, and the opinon of the adept is required upon that."

The Supreme Judicial court of Massachusetts, in *Dickenson* v. *Fitchburg*, 13 Gray, 546, at page 556, says, (the opinion being delivered by Chief Justice SHAW):

"In order to obtain the opinion of a witness on matters not depending upon general knowledge, but on facts not testified of by himself, one of two modes is pursued; either the witness is present and hears all the testimony, or the testimony is summed up in the question put to him; and in either case the question is put to him hypothetically whether, if certain facts testified of are true he can form an opinion, and what that opinion is."

We have found no case to sustain the proposition laid down in the brief of the learned counsel for plaintiff in error, on page 22 of their brief, and sought to be applied to this case, that "it is a well established rule relative to "this class of testimony that the opinion of a witness "cannot be given upon the evidence adduced before the "jury, unless that testimony is uncontradicted."

The rule is unvarying that the opinion of an expert cannot be taken, where, in order to reach an opinion he must find a fact in dispute, by weighing the conflicting evidence of witnesses. That is the province of the jury.

But the rule is equally unvarying, that where the testimony is uncontradicted, or where facts are stated hypothetically, either in the form of testimony heard by the expert, evidence read by the expert, or a hypothetical statement embodying the assumed facts, propounded to him, he may answer.

The facts submitted to the expert, whether true or false, must be definitely stated, so that the jury may know upon what assumed facts his opinion is based;

VII.

ERASTUS S. WILLIAMS' TESTIMONY.

(P. R., 187.) "I have been either on the bench or a practicing lawyer for about forty years, in Chicago. Have read or heard read the five hypothetical questions in this case." (Said questions or statements being the same as shown in the testimony of Leonard Swett.) "I can say I am acquainted with the reasonable and customary charges for such services as are described therein.

"Plaintiffs' counsel then asked witness to state what, in his judgment, the services named in these hypothetical questions were reasonably worth, taking them question by question, or together, as he chose, assuming, as stated in the hypotheses, that these are the facts."

(Same objections by counsel for defendant to the hypothetical questions as heretofore set forth in the objections to the hypothetical questions propounded to Leonard Swett; also objection to the answer of this witness thereto. Objections overruled; to which ruling of the court counsel for defendant then and there duly excepted.)

"Witness: Assuming the facts to be true, as they are stated in the hypothetical questions, I have an idea of the value of the services. I ought to say, however, in explanation, that I cannot separate the different portions of the services. To me, it seems to have been one whole thing, resulting, according to the hypothesis, in a certain highly beneficial result, as I will say, to the defendants. Supposing that hypothesis to be correct, the services must have taken up a very considerable time, and, so far as I can see from the hypothetical questions, they seem to have been rendered with great fidelity and with great discretion in the main. In fact, I do not think of anything that I see where it seems to me as if there was any blunder committed. As I understand, it is claimed on the part of the plaintiffs that, by virtue of the labor which was performed by them and the advice which they gave to their clients, the property—the 8,000 acres in Indiana—which had been covered by mortgage, and which mortgages were about to be foreclosed and were in process of foreclosure, was released entirely from the incumbrance; the incumbrance was all paid up; the property was sold for one mil-

ically whether, if certain facts testified [illegible] opinion, and what that opinion is."

We have found no case to sustain the proposition laid down in the brief of the learned counsel for plaintiff in error, on page 22 of their brief, and sought to be applied to this case, that "it is a well established rule relative to "this class of testimony that the opinion of a witness "cannot be given upon the evidence adduced before the "jury, unless that testimony is uncontradicted."

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The facts submitted to the expert, whether true or false, must be definitely stated, so that the jury may know upon what assumed facts his opinion is based;

conflicting testimony must not be submitted to him for him to weigh and find the truth; but the mode of bringing the facts to the mind of the expert may be by either oral or written testimony or by an hypothetical statement admitted or assumed to be true.

VII.

ERASTUS S. WILLIAMS' TESTIMONY.

(P. R., 187.) "I have been either on the bench or a practicing lawyer for about forty years, in Chicago. Have read or heard read the five hypothetical questions in this case." (Said questions or statements being the same as shown in the testimony of Leonard Swett.) "I can say I am acquainted with the reasonable and customary charges for such services as are described therein.

"Plaintiffs' counsel then asked witness to state what, in his judgment, the services named in these hypothetical questions were reasonably worth, taking them question by question, or together, as he chose, assuming, as stated in the hypotheses, that these are the facts."

(Same objections by counsel for defendant to the hypothetical questions as heretofore set forth in the objections to the hypothetical questions propounded to Leonard Swett; also objection to the answer of this witness thereto. Objections overruled; to which ruling of the court counsel for defendant then and there duly excepted.)

"Witness: Assuming the facts to be true, as they are stated in the hypothetical questions, I have an idea of the value of the services. I ought to say, however, in explanation, that I cannot separate the different portions of the services. To me, it seems to have been one whole thing, resulting, according to the hypothesis, in a certain highly beneficial result, as I will say, to the defendants. Supposing that hypothesis to be correct, the services must have taken up a very considerable time, and, so far as I can see from the hypothetical questions, they seem to have been rendered with great fidelity and with great discretion in the main. In fact, I do not think of anything that I see where it seems to me as if there was any blunder committed. As I understand, it is claimed on the part of the plaintiffs that, by virtue of the labor which was performed by them and the advice which they gave to their clients, the property—the 8,000 acres in Indiana—which had been covered by mortgage, and which mortgages were about to be foreclosed and were in process of foreclosure, was released entirely from the incumbrance; the incumbrance was all paid up; the property was sold for one mil-

lion dollars, three hundred and thirty-three thousand, three hundred and thirty-three dollars and thirty-three cents, of which was obtained in cash, and nearly $40,000 or more of interest, which was obtained. There was a demand, which was made by Horne, which seems to have been recognized as a valid one by Forsyth, which was reduced from $50,000 to $10,000. There was a very large amount of usurious interest, between $25,000 and $30,000, thrown off as a result of the litigation. Taking in view all these facts, I think the services were well worth $50,000. I would say it was an exceedingly moderate charge, in view of the character of the services and the result, as set forth in the hypothetical questions."

No specific grounds of objection have been urged against this testimony in the brief of plaintiff in error.

VIII.

JAMES GOGGIN'S TESTIMONY.

(P. R., 138.) "Practiced law sixteen years. Have read hypothetical question No. 1, and heard all the others read, except No. 5, about drawing of the mortgage. I heard that testified to by Mr. Doolittle on the stand. I am acquainted with the usual and customary charges for services of the kind named in the hypothetical questions.

The witness was then asked by the counsel for the plaintiffs to state his opinion as to the value of the services as stated and described, taken together or separately.

(Counsel for defendant objected to the questions for same reasons heretofore given and set forth in objections to the hypothetical questions propounded to Leonard Swett, and also objected to this witness' answer to said questions, and also objected to the witness testifying from what he has heard of the testimony in this case. Objections overruled by the court; to which ruling counsel for defendant then and there duly excepted.)

Witness: It is almost impossible for me to separate the questions, for the reason that the object of the whole litigation was the consummation of one great result. And I must assume, first, that the legal services and the business ability and the legal tact were combined and united to bring about the results that arose from the litigation; not only from the litigation, but from the business negotiation. I have estimated five per cent. on a million dollars to be a reasonable compensation for carrying through the negotiations.

Now, as to legal fees, the fees in setting aside the Horne contract, or reducing the contract for the payment of commissions to Horne,

that I would not estimate at a greater sum than $10,000. I think it is worth that. Defending in the foreclosure suit of the Pierson mortgage, that, perhaps, would be $2,500; that is, taking into consideration in that case not only the actual litigation and the necessary caution that had to be taken, but in defending a suit of that kind, in procuring the information in the east that tended to show that the notes had never been assigned, and, I infer from the evidence, led to the dismissal of the foreclosure suit. I think $2,500 or $3,000 would be a very fair and reasonable compensation for that. In filing the bill to redeem, and up to the end when they were discharged, I think about $2,000; drawing the mortgage, $500; defense of the Tremearne suit, $1,500 to $2,000. Heard the testimony in regard to claims against Mrs. Forsyth in the guarantee of notes, $12,000; I think $100 to $150 reasonable for that."

IX.

W. C. GRANT'S TESTIMONY.

(P. R., 189.) "Practiced law in Chicago about twenty-six years. I was of counsel for the Continental Life Insurance Company, which filed the bill to foreclose against Mr. and Mrs. Forsyth, and of counsel in the defense against the bill to redeem by them. I have examined hypothetical questions Nos. 1, 2 and 3." (Said questions being the same as shown in the testimony of Leonard Swett, Nos. 1, 2 and 3.) "I am acquainted with the usual and customary charges in such cases.

"The plaintiffs' counsel then asked the witness: 'Assuming the facts to be as stated in those three questions, what, in your judgment, would be a reasonable charge, or reasonable charges, to be made by the plaintiffs against the defendants? In other words, what were those services reasonably worth? You can take the questions separately, or together, as you choose.'

(Counsel for defendant objected for the reasons stated in the objections to the hypothetical questions in the examination of Leonard Swett, and also objected to witness' answer thereto; objections overruled. To which ruling counsel for defendant then and there duly excepted.)

"Witness: Assuming the facts as stated in the three questions, my judgment is, that in the foreclosure and bill to redeem a charge of $5,000 would be very reasonable. Assuming the facts stated in the hypothetical question No. 2, it appeared that the services, as stated in the question, were performed in the matter of the removal of the Horne contract, or the reduction of the commissions in that case from $50,000 to $10,000. That would be worth at least $10,000. I should

say that 25 per cent. in such a matter would be reasonable; 25 per cent. of the amount saved. And in the other matter of the sale of a large amount of property for a million dollars, securing one-third of that amount to be paid in cash, under the peculiar circumstances of the case, that ought to be worth from $25,000 to $40,000."

X.

THOMAS HOYNE'S TESTIMONY.

(P. R., 190.) "Practiced law in Chicago since 1839. I have read over hypothetical questions 1 and 2. I am ordinarily acquainted with the usual and customary charges for services of the kind described in the questions."

Thereupon the witness was asked to state what, in his judgment, the services set forth in the hypothetical statements 1 and 2 were reasonably worth.

(Counsel for the defendant objected to the questions, for the reasons given in the objections to the hypothetical questions in the examination of Mr. Swett, and also objected to witness' answer thereto. Objections overruled by the court; to which ruling counsel for the defendant then and there duly excepted.)

Witness: I would say, judging in that case from the character of the professional men engaged, their long experience and position, from the very large amount of money involved in the land in controversy, and from considering the services in the two-fold character of legal as well as a land negotiation or agency, I should say that the services were worth from $40,000 to $50,000. I should say that, judging from the circumstances as they are, assuming them, of course, to be true, and as stated in these two statements."

XI.

HENRY S. MONROE'S TESTIMONY.

(P. R., 190.) "Practiced law in Chicago about twenty-five years; have read hypothetical questions Nos. 1, 2, 3, 4 and 5 in this case." (Said questions being the same as shown in the testimony of Leonard Swett.) "Am acquainted with the usual and customary charges for services of the character described in them

The witness was then asked to state what, in his judgment, the services were reasonably worth, taking them together or separately.

(The counsel for the defendant objected to the questions and to the answer of the witness, for the same reasons as before stated in the objections to the hypothetical questions in the testimony of Leonard Swett. Objections overruled by the court; to which ruling counsel for defendant then and there duly excepted.)

Witness: Part of the services that were rendered as described in the hypothetical questions were, perhaps, unusual to a general practitioner, but I have an idea of them; taking all the services rendered as detailed in all those hypothetical questions, $50,000 would be very reasonable; $60,000 would not be excessive."

(P. R., 190, 191). "The answers of the witnesses, Leonard Swett, Robert Hervey, Erastus S. Williams, James Goggin, William C. Grant, Thomas Hoyne, Henry S. Monroe and William G. Gulliver, respectively, to the said hypothetical questions propounded by plaintiff's counsel were severally duly objected to by counsel for defendant, and the objections were each and all overruled by the court; to which ruling of the court counsel for defendant then and there duly excepted."

XII.

THE HYPOTHETICAL QUESTIONS.

The specific objections to these questions which were urged in the court below, not having been brought to the attention of the court in the brief of the plaintiff in error, we will state as we understand them the objections which counsel have made in their argument before this court.

1st. The statements contain a minute, elaborate and detailed statement of facts.

2d. The hypothetical case occupies 147 pages of the record.

3d. It must have required a full judicial day to read it to the jury.

4th. It probably required more time in its preparation than the performance of the services sued for.

5th. The court committed an outrage on the jury and the court, by permitting the hypothetical case to be read in their presence.

If this were all true, as alleged, there was no error. No impropriety in the questions is shown, or charged. When the indictment against the hypothetical case is examined, and the various counts looked into, it appears that the three last are based on the opinion of the learned counsel taken on the first two.

It is admitted by defendants in error that the hypothetical statements are elaborate, and occupy 147 pages of the record, but they contend that those statements are a truthful recital of a portion of their services rendered to the plaintiff in error and her husband. And without feeling compelled to come to their defense, defendants in error maintain that those statements are a clear, temperate, intelligible recital of a large portion of their services, and that they are sustained by the evidence, as stated in the bill of exceptions. (P. R., 25.)

We would state to the court, that embraced in the hypothetical case are many of the exhibits introduced in evidence on the trial.

The whole of some, and portions of others, of about seventy of the one hundred and twenty exhibits introduced by defendants in error on the trial, are embodied in the hypothetical case. From a hurried examination of the record on this point, we state that the exhibits thus copied into the statement occupy about 110 of the 147 pages, *thus leaving 37 pages as the space taken up in stating the effect of the oral testimony given on the trial.* When it is remembered that the trial lasted from April 4 to May 2, 1883, and in view of the fact certified

to by the court, that the testimony admitted was voluminous, the defendants in error feel that they succeeded, in a commendable degree, in compressing into small compass the effect of the large amount of oral testimony. It may not be out of place to say that this court may well believe that in such a series of transactions, begun, attempted and carried through during a busy period of many months, the actual occurrences were multitudinous.

The defendants in error were suing for services, and were entitled to state all the labor done and performed, in detail, with all possible minuteness.

They were entitled to prove it before the jury; and on the question of value, to submit the evidence as they claimed it to be, to experts for an opinion.

The difficulty of preparing the hypothetical case, and the time consumed in its preparation ought not to be complained of by the party whose course of action toward the defendants in error imposed that labor upon them ; but in this connection, we will say, that the opinion of the learned counsel who surmise that such labor was greater than that expended by us in the service of their clients, is a patent absurdity. It involves an unwilling (and unintentional) recognition, by the learned counsel, of the extent and importance of that service.

The Length of the Hypothetical Case.

As before stated, the length of the hypothetical questions was caused by setting out portions of some and the whole of others of the exhibits introduced in evidence. These exhibits were in evidence before the jury. It was proper to read them in full to the jury.

It was permissible, in the discretion of the trial judge, to allow each of them to be read any number of times to the jury, both during the reception of testimony and the arguments of counsel.

It was proper to give all the exhibits introduced in evidence to the jury upon retiring to the jury room. It was proper for the jury to read and re-read each of the exhibits during their deliberations.

These exhibits were part of the evidence showing the labor done and performed by defendants in error, and it was proper to submit them to experts as well as to the jury.

Referring to the language of the learned counsel, we will say that, if there was an *outrage* committed in submitting those exhibits to the expert witnesses, there was an equal and no greater an "outrage" in introducing them in evidence, before the jury.

It was equally an outrage, that the exhibits were in existence as evidence of the labor of defendants in error.

The counsel of plaintiff in error state that that they have looked in vain through the reported cases to find any case which would justify the submission of such an hypothetical case in the hearing of the jury.

In answer we will reply that the learned counsel have not been able to find any case holding that the reading of such an hypothetical case in the hearing of the jury, is improper, or any case which limits the number of facts which may be embraced in a hypothetical question.

Counsel for plaintiff in error cite the case of *Haish* v. *Payson*, 107 Ill., page 365, as most nearly like the case at bar.

We will therefore draw the attention of the court to this citation, with some particularity, premising our comments with the statement that the decision of the court was right, and in no way conflicts with our views.

The statement in the opinion the court, at page 370, disposes of the whole matter.

"*The evidence which was permitted to be given, and the so-called hypothetical question* which was allowed to be put and read over to witnesses, were calculated to draw away the minds of the jury from the true inquiry, what was the extent and value of the professional services rendered the defendant by the plaintiff, to the *contemplation of the large sums of money which would result in future* from the saving of royalty, which, in fourteen years, would reach the enormous amount of $1,120,000, suggestive of the idea to the jury, that the plaintiff ought to be admitted to a participation of such magnificent gains. While the amount involved might not improperly be considered in fixing the value of the plaintiff's services, *yet we consider it not admissible to go into an inquiry concerning prospective benefits which might accrue in the future.* Testifying to the amount of the benefits which would be realized by the defendant in the future is not the statement of a fact, but the giving of an opinion. In the present case, opinions may be received as to the value of the services, *but opinions as to benefits in the future are not admissible.*"

Again, on page 371:

"The objection is not that the amount involved might not be taken into consideration, but the mischief of the course pursued was, that it was calculated to mislead the jury to think that the ultimate benefits to be derived by the defendant was the measure of compensation."

It appears that the trial court permitted evidence to go to the jury covering the prospective profits of the client of Payson, and allowed an hypothetical question to be propounded to experts embracing the same feature.

The evidence and the hypothesis clearly entered the domain of speculation.

The rule which forbids the awarding of speculative

damages, forbids the consideration of speculative benefits, as the basis for awarding damages.

The inquiry in either case seeks to establish the unknown and the unknowable. It is as much as the ordinary mortal can do to know and state what has happened, and it is reserved to the Omniscient alone, to know what will happen.

The court in *Haish* v. *Payson*, says:

> " Testifying to the amount of the benefits which could be realized by the defendant *in the future*, is not the statement of a fact, but the giving of an opinion."

The court might have said that such an attempt by witness, or expert, was an effort to prophesy, to " dip into the future, far as human eye can see," and farther still, and to predicate a surmise (as to a result in the distant future) upon a series of events which are unknown and unascertainable, because they have not yet transpired.

It is needless to say that such evidence is not, and under the conditions imposed on human nature cannot be proof, nor can it deserve a higher degree of credence than any other work of fiction.

The hypothetical question in *Haish* v. *Payson* was out of place in a court of law; and its theory and purpose were so thoroughly repugnant to the fundamental principles of the law of evidence that the Supreme court of Illinois ruled against it with spirit, condemning it as an anomaly.

But how does that case bear upon the hypothetical questions in the case at bar?

Those questions nowhere call the attention of the

experts to the consideration of any imaginary, prospective or contingent benefit or result to be derived by the plaintiff in error. They are a mere recital of existing facts, completed acts and results already attained.

The learned counsel of plaintiff in error have not pointed out a statement in our hypothetical case which enters the domain of uncertainty or of speculative benefits. There is between it and the Haish hypothesis, the difference between history and fiction.

THERE IS NO LAW WHICH PRESCRIBES THE LENGTH OF A HYPOTHETICAL QUESTION.

In the nature of things no limitation can be imposed.

The duration of a jury trial, the length of a master's report, the number of folios in a decree, the number of facts in a case, cannot be fixed by rule or enactment.

An hypothetical case should fit the case in which it is used, whether short or long, simple or intricate.

The questions made use of in this case were prepared with care, in order to present as many of the facts to the experts as practicable, upon the principle well recognized by authority, that the nearer the hypothesis is to the actual facts the greater the value of the expert's opinion.

The learned counsel have not indicated any way by which the hypothetical case could have been shortened without leaving out some of the facts showing the services of the defendants in error. They do not pretend that the facts therein stated are not sustained by evidence. If their objection be that there are too many facts, we confess our inability to remove it.

The reason, why the exhibits were set out as fully as they are found in the hypothetical case, was a double one.

1. To avoid the risk of misconstruing the exhibits which would surely be incurred, in an attempt to abridge their statements of facts, or to give their legal effect. In the event of such misconstruction, there would be a variance between the hypothesis and the proof, and the hypothetical case would incur the objection of being a "partial statement of facts," and as drawing improper conclusions from the evidence.

2. To enable the experts to obtain as clear and distinct a knowledge of the exhibits as the jury had already obtained on the trial.

The form and length of a question addressed to a witness, must be left very largely to the judgment and discretion of the trial judge, as an incident of the trial; and, if the substance is correct, the form is unimportant.

The court charged the jury with great care and precision.

We quote from printed record, page 206:

"As to the questions, you must understand that they, that is, the questions, are not evidence; they are mere statements to these witnesses, called by the respective parties, of what the party putting these questions claims the proof shows was the nature and amount of plaintiffs' services rendered; and, upon the hypothesis or assumption of these questions the witnesses are asked to give their estimate of the value of these services. You must readily see that the value of the answers to these questions, depends largely, if not wholly, upon the fact of whether the statements made in these questions are sustained by the proof. If the statements in these questions are not supported by the proof, then the answers to the questions are entitled to no weight, because based upon false assumptions or statements of facts."

Speaking of the opinions of value given by the experts, the court, in its charge to the jury, said (P. R., 208):

"You are not bound by the estimate which these witnesses have put upon these services. They are proper to be considered by you, as part of the proof bearing upon the question of value, as the testimony of men experienced in such matters, and whose judgment may aid yours. But it is your duty, after all, to settle and determine this question of value from all the testimony in the case, and to award to the plaintiffs such amount, by your verdict, as the proof satisfies you is a reasonable compensation for the services which, from the proof, you find plaintiff rendered, after deducting the amount the plaintiffs have already received for such services. Of course, if the proof satisfies you that the plaintiffs have already been fully paid, your finding will be for the defendant, because nothing is due, and no verdict can be rendered for the plaintiffs; but, if not, then you will state in your verdict the amount yet due to the plaintiffs."

We maintain that the hypothetical case, as prepared by defendants in error, was necessary, in order to present in reasonable fullness the facts of the case to the experts; that it is constructed in proper form; that its proper status in the case was clearly and definitely fixed by the court in his charge to the jury; that the court exercised superabundant caution in referring to the question, and in stating the effect to be given to the opinions of the expert witnesses; and finally, that the case was fairly and fully submitted to the jury as a question of fact to be determined by them.

The slur cast upon the judicial fairness of the judge who tried the case, which the learned counsel have seen fit to make in their brief for the plaintiff in error, without specifying upon what the insinuation rests, we do not feel called upon to repel. His character and eminent abilities on the bench need no herald or defender before this court.

In Conclusion.

The last ground, may it please the court, upon which the plaintiff's brief asks a reversal of the judgment is in these words, viz.:

"No one can read the record of the case before this court, without being impressed strongly with the feeling that, independently of any mere errors of law in the specific and particular rulings of the court, there was not a fair trial of the cause.

"We confidently submit this case to the court as one to be reversed, because *it is manifest that justice has not been done.*"

This charge against the fairness of the trial, and the justice of the verdict, is either an attempt to influence this court into declaring error to exist, when none can be pointed out, or an invitation to the court to re-try the case, as if it were both court and jury, an invitation which the court has invariably declined, as beyond its jurisdiction.

But though the record does not assume to give all that occurred upon the trial, yet, if the court will look into it and examine the careful and comprehensive charge of the judge upon the evidence, no doubt will be entertained that the *trial was fair*, and the *verdict manifestly just*. And, at the same time, we think, by such perusal, the conscience of the court will be fully satisfied that the plaintiff in error brought this suit, and obtained the *supersedeas* (P. R., 218), which has delayed proceedings on the judgment of the court below, merely for delay; and, therefore, that the judgment should be, not only, affirmed with interest and costs, but *affirmed with an award of ten per cent. damages, under Rule 23.*

It is due to Mr. James R. Doolittle, Junior, to say that he was the party who had done most of the work for the Forsyths. From necessity he was called as a witness to

detail, on the trial, the exact services as rendered, in the order of time, and to produce all the papers, which were a part of, or the subject matter of their work—the main part of which is set out in their hypothetical case. As to the papers, they speak for themselves. But as to the main facts in the great work of negotiation—as to what was done, and how it was done, and who did it—the disinterested testimony of Ord, the purchaser, and of Gulliver and Simpson, his able counsel, of the firm of Alexander & Green, of the city of New York, establish all the main facts stated by him in his testimony.

JOHN W. SIMPSON (P. R., 30) "testified to interviews "and discussions as attorney and counsel for the pur- "chaser, with James R. Doolittle, Jr., as attorney and "counsel for the defendants" (Forsyths), "relative to "the contracts *substantially as testified to by Mr. Doolittle, "Jr.*"

Mr. ORD (P. R., 29), when pressed on cross-examination by the astute counsel who tried the cause for the defendants in the court below, "testified as follows:

"Question by Mr. King, counsel for defendant: Have you any interest in James R. Doolittle, Jr., particularly?

"A. I have a social and friendly interest in him.

"Q. No pecuniary interest in Mr. Doolittle?

"A. Certainly not. I have no interest whatever in this matter in any way, shape or form, except I am anxious to testify to the great ability Mr. Doolittle showed, both as a lawyer and a negotiator, holding up the price of this land in a long series of negotiations, when he was dealing with men who are very shrewd, and one of whom (Senator Barnum) is noted as being particularly able in making what is called a trade. I am glad to testify to it. I have given up a great deal of my time in coming to this office (where his deposition was taken) in order that Mr. Doolittle may have the benefit of my knowledge of the facts in this transaction, because I want him paid for his services, and because, so far as I am concerned, I would be glad that it should be generally known how much ability, how much zeal, how much legal knowledge he showed in all these transactions, which I believe were carried on and were completed entirely by his efforts.

"Mr. King (interrupting): Your belief is not asked for, and I object, and ask that your belief be stricken out as immaterial and incompetent testimony.

"(Objection and motion overruled, and exception by the counsel for the defendant.)

"The witness, continuing: Then I desire to *state as a fact that this whole negotiation was conducted with Mr. Doolittle.*"

And this witness further testified (P. R., 30):

"At the end of *several weeks' discussion, extending over all this matter*, Mr. Doolittle obtained my signature to the contract, agreeing to pay the price which he had asked, or his clients had asked" ($1,000,000.)

Presumably in order to depreciate the extent and value of the work, the brief of plaintiff in error (pages 5 and 6), asks the court to bear in mind that no services are claimed in the declaration to have been rendered after November 10, 1881, (the date of sale to Ord), "and *are shown* "*by the record* to have been, so far as the defendants in "error are concerned, rendered *exclusively by one member* "*of said firm, namely, James R. Doolittle, Junior.*"

The record shows that both these statements which the court is asked to bear in mind, are simply mistakes *in fact*. From some inadvertence, we suppose, the writer of the brief did not see that the record shows (P. R., 8), that the declaration claimed for their services "*until* "*the first day of January, 1882;*" and also shows (P. R., 176), that after the tenth of November—after the contract of sale was completed—"one of the plaintiffs" (defendants in error) "left Chicago for Indianapolis, reaching there November 21st." His business was to argue the demurrer in the Tremearne suit and to obtain a decree in order to clear up the title to the land they had already sold; and, upon which, they had already received one-third of a million, cash down, and that, too, in face

of the pending litigation. The demurrer in that case was argued, and sustained, and the decree was entered November 28th (P. R., 177), clearing the title; and, it also shows (P. R., 132), that it was not until "on or "about the twentieth of January, 1882, *the plaintiffs (be-* "*low) were formally discharged by the defendants (For-* "*syths), from their employment as attorneys and solici-* "*tors.*"

The other statement of the brief, that the record shows that all the services of the defendants in error were rendered *exclusively by one member of said firm, James R. Doolittle, Junior,* is equally a mistake. The exact truth as to who did the work appears in the record. (P. R., 32.)

Mr. Simpson, speaking of the contracts, which first brought the minds of the contracting parties to an agreement, testified:

"*Those contracts were brought about by Mr. Doolittle, Jr., with the aid, in one or two emergencies (I am simply stating what I know of my own observations), of Mr. Doolittle, Sr., on the one side, and Senator Barnum and myself on the other. Execution of the contracts was secured by the services of the plaintiffs. That was not an opinion; the witness knew that to be a fact.*"

While the main part of the work and all its details were done by Mr. Doolittle, Jr., enough appears in the record to show that the senior member of the firm, in *the critical emergencies, took part. When Senator Barnum, the business adviser and controlling power,* agreed upon the final terms of purchase, Mr. Doolittle, Sr., took an important part.

But that is not all the record shows. Mr. Hardin (P. R., 27) testified that Forsyth (not the agent of his wife, but jointly liable with her), told him:

"After the sale took place, it had been his *very great good fortune in securing Judge Doolittle and his son as his counsel; that giving character to the transaction had aided largely the sale.*"

The charge of the judge (P. R., 200) says:

"For the purpose of showing the reasonable value of the services, the plaintiffs have called as witnesses seven gentlemen who are practicing lawyers in this city, and a Mr. Gulliver, who, while practicing mainly in New York City, has had, as he testified, much experience in regard to the value of such services in other places, including the city of Chicago; and these gentlemen have given you their estimates of the value of the plaintiffs' services, some in the aggregate, and others somewhat in detail; and these estimates vary from $40,000 to $65,000, as to the total value of the services."

The learned judge, on the same page, goes on to state what the defendants insisted upon, and attempted to prove, on the trial.

"The defendants, while admitting that the plaintiffs were employed to defend the foreclosure and the Tremearne suit, and to prepare the bill to redeem, insist: *First*, that the plaintiffs were never employed as negotiators in and about the sale of the land in question, and that Forsyth made the negotiations. *Second*, that the plaintiffs' employment was only as attorneys in the conduct of the several suits mentioned in the trial, and in the preparation of contracts," etc.

"*Third.* Defendant admits the plaintiffs rendered some services in the examination of abstracts of title of several of the tracts of land known as the outside or option purchases," etc.

"*Fourth.* That the actual services rendered by the plaintiffs were much less than that claimed by the plaintiffs; that the plaintiffs were only retained to assist McDonald & Butler, eminent lawyers in Indianapolis, in the foreclosure suit, the Tremearne suit and bill to redeem from the trust deed," etc.

The charge also says the defendant below insisted, among other things:

"(P. R., 201.) That the extent and amount of the plaintiffs' compensation it was agreed should be left to Mr. Forsyth;" and "that the plaintiffs have been paid $2,500 for their services; and that said sum is a reasonable compensation for all the services rendered by the plaintiffs to the defendants."

The charge also says:

"(P. R., 206–7): The defendants have called eight lawyers, well known gentlemen of the bar of this city, and engaged in their practice here, and have propounded to them a hypothetical question, embodying a statement of what services the defendant claims the proof shows the plaintiffs performed for the defendants; and these witnesses, upon the statement of the nature and extent of the services so rendered, have given you their estimates of what would be a fair and reasonable compensation for the plaintiffs' services as stated in the defendants' hypothetical question."

And the judge also says:

"(P. R., 202): Those estimates of the defendant's witnesses were from three to ten thousand dollars. I name the lowest and highest amounts mentioned."

The estimates of the plaintiffs' expert witnesses, of the value of the services set out in their hypothetical case, ranged from $40,000 to $65,000. While the estimates of the defendants' expert witnesses upon the value of their services as limited by defendants' hypothetical question, ranged from $3,000 to $10,000.

The record thus shows there was absolutely no conflict between the expert witnesses of the plaintiffs, and the expert witnesses of the defendants. The only real conflict was one of fact between the hypothetical case of the plaintiffs and that of the defendants. Which one was true according to the evidence? That was the question.

The defendants' expert witnesses who were called upon to value their services, were not asked to give an opinion on the facts stated in plaintiffs' hypothetical case. They were required to confine themselves to the defendants' hypothetical case; and, *to leave out of their consideration all their services as negotiators in selling the land for $1,000,000, and of reducing Horne's commission contract from $50,000 to $10,000*, and also to leave out of view much of the services of the plaintiffs as stated in

their hypothetical questions Nos. 3, 4 and 5. The defendants' experts were invited to the play of Hamlet with Hamlet left out. The main issue of fact in the case was as to the conduct of the negotiations, or as clearly put by the court in his charge to the jury:

"Who did the negotiating and settling of the terms of "these several contracts, changing their terms from time to "time, to meet contingencies? Did the main burden of "that duty fall upon, and was it performed by, the plaintiffs, "as their proof tends to show, or was it mainly and substantially done by Mr. Forsyth, as the defendant's proof "tends to show?"

The learned judge in his charge again and again cautioned the jury, and instructed them as to the nature and office of hypothetical questions. On page 206, (P. R.) he said:

"As to the questions you must understand they—that is, the questions—are not evidence. They are mere statements to these witnesses, called by the respective parties, of what the party putting these questions claims the proof shows was the nature and amount of plaintiffs' services rendered, and, upon the hypothesis or assumption of these questions, the witnesses are asked to give the value of their services. You must readily see, that the value of the answers to these questions depends largely, if not wholly, upon the fact of whether the statements made in these questions are sustained by the proof. If the statements in these questions are not sustained by the proof, then the answers to the questions are entitled to no weight, because based upon false assumptions or statements of facts; so that to estimate the value of the testimony of these expert witnesses, you are first to determine whether any or all of these questions, and which of them, makes a correct statement of the facts established by the proof.

The questions, especially those on the part of the plaintiffs, are very long and elaborate, and open to serious objections for that reason. But in the haste of the trial it was impossible for the court to reconstruct or abridge them, and I therefore allowed them to be answered, stating to you at the time you were not to consider these questions as arguments, or as facts, in the case, but only as the assump-

tion of the party propounding them, that the proof justified and sustained the position that the facts stated in these questions were established by the proof; and I now repeat that caution, so that you need not be misled by these questions, or give them a weight to which they are not entitled. They are simply questions to the witnesses containing a statement of the party putting them, of what he claims the proof establishes and the testimony of the witnesses based upon them.

If the proof satisfies you that the plaintiffs performed for the defendant these services stated in plaintiffs' five hypothetical questions, then you may properly consider the answers made to these questions by the witnesses called in behalf of the plaintiffs, as to the value of the services.

The services were performed in 1881. More than five years have elapsed. The sum recovered was but a moderate and reasonable sum for those services. There was no conflict as to value, but only as to the extent of the services rendered. That question being determined in favor of plaintiffs below, the uncontradicted testimony of their experts was that the services were worth from $40,000 to $65,000, or an average of $52,500; yet the jury, who were properly instructed by the court that they were not bound by the estimates of the experts, gave a verdict for but $40,000; which sum, with the $10,000 paid Horne, aggregated no more than plaintiff in error and her husband had originally contracted to give Horne alone, as commissions, namely, $50,000; which contract defendants in error reduced to $10,000, they having accomplished what Horne had undertaken and failed in.

So that, including the commissions that were paid, and including all expenses in all their litigations to clear the title, the Forsyths, if they had paid that sum to us, would have gone through this great transaction and all its litigations at an expense of only about *five per cent.* on the price received on the sale.

Plaintiff in error has no just ground to complain of the verdict. If there is any injustice, it is in this: that the amount found in favor of the plaintiffs below was not larger upon the evidence; it should have been at least $50,000.

The plaintiffs in error have able counsel. But their brief, upon its face, is evidence that the plaintiffs in error can have had no other motive than delay in staying proceedings in the court below; because, as we have seen, there is not a single point of law, upon which a doubtful question can be raised, by the authorities.

Taken all altogether, that brief may be summed up substantially in three words:

CLAMOR, ASTONISHMENT, DEPRECIATION.

Clamor at the length of the hypothetical case of plaintiffs below.

Astonishment "that the able judge who tried this "case *permitted such an outrage upon the patience of the "jury and the time of the court as the reading of such a "paper in their presence*," (Brief, p. 26, 27), and

Depreciation, in saying (Brief, pp. 26, 27): "The "preparation of it involved more labor, in all probabil- "ity, than was expended by defendants in error" in the service of the plaintiffs.

But all seems to be based upon the length of the hypothetical case. The learned judge, with that judicial instinct which always seeks to save time in trials, thought these questions "very long and "elaborate, and open to serious objections for that "reason," and thought if he had time he could re-

construct or abridge them. *Perhaps, with his great power to condense in statement, he could do so. Yet he had never tried it. The defendants in error had.* We think no one can read them without being impressed that they were drawn with care; and, while they cost labor, that labor was mainly devoted to condensing and yet clearly stating the exact facts. Webster, if we are not mistaken, once said in excuse for writing a long letter, he had not time to make it short. But with all the time and labor spent to shorten the hypothetical statements, we admit that they are still long. But that length, as it seems to us, is caused, not by the *want of terseness and simplicity in statement, but in the great mass of facts stated.* There is not one repetition. Hardly a word could be left out without change of meaning, or leaving out a fact. They are made up, too, as we have seen already, in great part, of the documents which were themselves part of, or the subject matter of, their services as attorneys and negotiators. While it is easy enough *to say, shorten them; to do it is another thing. There are but two ways possible.*

One is, to leave out part of the facts, and that would be to leave out part of the case. The only other is, to leave out copies of the documents, which were themselves either a part of our work, or the subject matter of our labor; and, having left them out, to state their effect, and thereby run the risk of stating it wrong, and by not stating their effect with exactness, to give the expert witnesses a false basis for their opinions.

Take the most common case of all, that of expert opinions on the question of sanity. The testimony set out in hypothesis or in depositions may

cover all that a human being says and does during a series of years. The witnesses in such case must either read for themselves, or hear read in presence of the jury, all those facts as stated in depositions or in hypothesis, though they should reach thousands of folios, and it should occupy weeks in reading. When seriously considered, this outcry against the length of the hypothetical case is without even a plausible excuse.

The record shows that the hypothetical questions were supported by the evidence (P. R., 25); and, the jury found them to be true. And, for all the purposes of this case, this court will assume them to be true. If true, how utterly absurd the violence of the criticism. Admit that the counsel on the other side could shorten them, and state the facts in fewer words (though we do not believe they could shorten them by a single page without changing their meaning or leaving out facts), is it any valid objection to them because the same truths might have been stated in some fewer words? The very idea of an objection on that ground is little short of the ridiculous. And whether they could be shortened or not, that it was a matter of pure discretion, and not error at all, for the judge to allow them to be read, is absolutely too plain to admit of argument.

Again, the most unjust and groundless charge made against Judge Blodgett, of partiality, of bias, and even of *outrage in the trial* below (in the absence, as we have seen, of any substantial merit in the errors assigned in the brief of the plaintiff in error), and without the shadow of a pretext to hang upon, is in itself a con-

fession of the righteousness of the judgment, and goes directly to the *bona fides* of the plaintiff in error in suing out the supersedeas. It leads irresistibly to the belief that the sole motive was merely to obtain that *delay of over three years*, which the state of business in this court has accorded to the plaintiff in error.

Respectfully submitted.

M. W. FULLER,
J. R. DOOLITTLE,
J. R. DOOLITTLE, JR.,
Counsel for Defendants in Error.

120-93

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 107.

JAMES R. DOOLITTLE, JAMES R. DOOLITTLE, JR., AND HENRY MCKEY, *Defendants in Error*,

ads.

CAROLINE M. FORSYTH, IMPLEADED WITH JACOB FORSYTH, *Plaintiff in Error.*

Suggestion of Defendants in Error.

May it please the Court:

Before the argument of this cause begins, the counsel for the Defendants in Error respectfully call attention to the brief of the Plaintiff in Error, filed October 13, 1886, and to the supplemental brief filed December 13, 1886.

An inspection of the first on pages 1, 2 and 3 will show that no specifications of error were made as required by Rule 21.

An inspection of the supplemental brief, which assumes to be filed "in order that the errors here-

tofore assigned in plaintiff's original brief, filed in this cause on the 13th day of October, 1886, may be made more specific and particular as to the errors so assigned, *so far as relied upon by the Plaintiff in Error*," will show an assignment of fifty-seven errors.

This supplemental assignment of errors contains fort-eight printed pages, and no argument or statement of the case. It incorporates the whole bill of exceptions, except the hypothetical questions, a portion of the charge of the Judge, and the exceptions taken on the overruling of the motions for a new trial and in arrest of judgment.

Neither the Court nor counsel can form any opinion of the specification of errors relied on, unless they are to assume that they are all relied upon.

The specifications of error, founded on fifty-seven separate exceptions to the admission and rejection of evidence and to portions of the charge, cannot be stated in the hearing of this court, even without argument, in less than two hours.

We look upon the original brief as a disregard of rule 21 ; and, upon the supplemental brief as an unlimited assignment of errors which, in the language of this Court, is "a perversion of the rule, defeating all its purposes, bewildering the counsel of the other side, and leaving to the Court to gather from a brief, often as prolix as the assignments of error, which of the latter are really relied upon." *Phillips et al.* vs. *Seymour et al.*, 91 U. S. S. C. Rep. 646, quoted from page 648.

The Defendants in Error respectfully ask the special leave of this Court, before the argument begins, that the time allowed for argument to their counsel be extended for such time as this Court shall deem reasonable.

J. R. DOOLITTLE,
J. R. DOOLITTLE, Jr.,
M. W. FULLER,
of Counsel for Defendants in Error